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No. 73-2065

In the Supreme Court of the United States

OCTOBER TERM, 1974

CONCORDIA PARISH SCHOOL BOARD,

Petitioner,

v.

SAMMY DAVIS, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

JOHN F. WARD, JR.,
770 North Street,
Baton Rouge, Louisiana 70802.

W. C. FALKENHEINER,
District Attorney,
Vidalia, Louisiana 71373.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered April 24, 1974.

CITATIONS TO OPINIONS BELOW

The decision of the District Court is unreported and is printed herein as Appendix "A," page 21. The decision of

the Court of Appeals for the Fifth Circuit is unreported and is printed herein as Appendix "B," page 23.

JURISDICTION

Judgment of the District Court was entered on September 1, 1972. Judgment of the Court of Appeals was entered on April 24, 1974. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. May the Federal Courts order the reinstatement, with three or four years' back pay, of a black principal dismissed by the school board after a full due process tenure hearing held in accordance with state's Teacher Tenure Law, at which hearing the principal was represented by counsel, and after which hearing the school board found him guilty of three (3) of four (4) charges of willful neglect of duty, incompetency and dishonesty relating to the mismanagement and misuse of public funds and equipment entrusted to his care merely because the school board had not filed with the District Court, or the District Court had not yet approved, so called "objective criteria" required by previous orders of the District Court pursuant to the decision of the Fifth Circuit Court of Appeals in *Singleton v. Jackson Municipal Separate School System* (5th Cir., 1970) 419 F.2d 1211, and *Smith v. Concordia Parish School Board*, 445 F.2d 285, when:

   1. The District Court had rendered judgment on August 18, 1971 refusing to enjoin the school board from holding its proposed tenure hearing with regard to the dismissal of Respondent Davis, and suggesting same as the proper procedure for the Board to follow.

   2. Respondent Davis took no appeal from such judgment

and waited almost a full year, until June 12, 1972, before taking any action with regard to his dismissal by the board on September 1, 1971.

3. The school board had actually filed with the District Court, prior to holding the tenure hearing for Respondent Davis, objective criteria suggested by the District Court itself as being acceptable, and

4. The objective criteria filed by both plaintiffs and the United States Government in response to the District Court's order, admits that no "objective criteria" exist which would have been applicable or relevant to the dismissal of Respondent Davis and further suggest, as proper, the very procedure utilized by petitioner, the Louisiana Teacher Tenure Law.

II. Did the Court below err in refusing to permit petitioner to supplement the record on rehearing when petitioner discovered that the record before the Court of Appeals was incomplete due to that Court's considering this matter under the expedited rules of a school desegregation *Singleton* type case on the original record and the District Court Clerk inadvertently forwarded to the Court below only that portion of the record covering proceedings on and after June 12, 1972 and omitting all District Court proceedings relative to Respondent Davis in 1971 including particularly the District Court's judgment of 1971 directing the board to proceed with the tenure hearing for Respondent Davis?

III. In any event, did the Court below err in awarding back pay to Respondent Davis in view of this Court's recent decision in *Edelman v. Jordan*, ____ US ____, 39 L.Ed. 2d 662, 94 S.Ct. ____ (March 25, 1974) construing the Eleventh Amendment of the United States Constitution to prohibit the award of retroactive money judgments against the state treasury?

STATUTES INVOLVED

The statutes and constitutional provisions involved in this case are the Eleventh and Fourteenth Amendments to the Constitution of the United States of America and Louisiana Revised Statutes, Title 17, Section 441-444 (the Louisiana Teacher Tenure Law), and Louisiana Revised Statute, Title 17, Section 421 et seq.

STATEMENT OF THE CASE

Defendants sincerely believe that the Court below completely misapprehended the facts and circumstances and chronology of events in this case due partially to the manner in which it was presented by plaintiff and partially to the fact that examination of the record which was before the Court reveals that the record considered by the Court was not complete. The record's not being complete is probably due partially to the District Court's permitting this separate action of dismissal of a teacher for cause to be filed in the original school desegregation suit, *Irma J. Smith, et al, v. Concordia Parish School Board, et al*, No. 11,577, on the docket of the District Court, which was already a voluminous record. Apparently, the District Court Clerk recognized this proceeding to be different but inadvertently forwarded to the Court of Appeals only that portion of the record commencing with, and subsequent to, the last motion filed by Respondent Davis on June 12, 1972, almost a year after his dismissal.

As a consequence, that portion of the record covering proceedings in the Court below during the school year 1970-71, during which time the District Courts in Louisiana first began ordering the filing of objective criteria pursuant to *Singleton* and during which time, including the summer of

1971, Mr. Davis was dismissed and his **proposed tenure hearing** was considered, **and affirmed,** by the District Court, does not appear in the record which was before the Court of Appeals.

Defendants respectfully submit that a complete and clear understanding of exactly what transpired with respect to Respondent Davis is so important to this Court's final decision that they should be restated even at the risk of unduly lengthening this petition for Certiorari.

By order of September 18, 1970, the judges of all divisions of the Western District of Louisiana jointly directed all school boards in the Western District to file objective criteria required by the Court below in its *Singleton* decision. In view of the importance of that order to all school systems in Louisiana, the Louisiana School Boards Association (a statewide service organization for school boards, hereinafter referred to as "LSBA") obtained an extension of time from the Judge of the Western District for school boards to respond to that order.

During this extension, LSBA convened a meeting of school superintendents and enlisted the aid of certain educational research personnel from Louisiana State University to assist in trying to formulate some reasonable "objective criteria" which school boards could utilize. After several meetings of this group, these educators concluded that teaching, much like law, was so subjective in nature that no reasonable, purely objective criteria could be devised which could be used in employment, promotion and demotion which would not seriously damage the quality of education except in a true *Singleton* situation where a reduction in force is made neces-

sary due to a drop in enrollment, etc., caused by converting to a unitary system.

In a true *Singleton* situation, all of the existing teachers are presumably competent and some are being released only because of having too many. In that situation, objective criteria such as college degree and seniority, or even a "last in-first out" rule, could be utilized as objective criteria—but only in that situation. As this committee of educators felt it could not recommend any purely objective criteria to the school boards, LSBA commenced a series of discussions with the Justice Department regarding this problem.

In the meantime, the then judges of the Western District indicated verbally that they thought the Louisiana Teacher Tenure Law might be acceptable and LSBA so notified the school boards, enclosing a suggested form for responding to the Court's order. In addition, the Chief Justice of the Western District, the Honorable Ben C. Dawkins, Jr. (the District Judge in this case), on February 15, 1971, wrote all school boards under his jurisdiction, including defendant herein, enclosing statements of objective criteria filed by two school Boards and suggesting that the other school boards should file similar statements in response to the September, 1970, order regarding objective citeria. (See Appendix C, page 27.) On March 2, 1971, defendant herein responded to the District Court's order by filing the objective criteria suggested by the Court assuming, of course, that such criteria were acceptable and approved. (See Appendix D, page 33.)

On April 16, 1971, the Justice Department filed a motion with the Court objecting to defendant's proposed objective criteria and requesting an extension of thirty (30) days within which to submit its own suggested criteria. (See Appendix E, page 39.) On April 23, 1971, defendant filed its response to

the Government's motion agreeing to the requested extension. On May 26, 1971, the Justice Department filed a motion in fifteen (15) school desegregation cases in the Monroe and Shreveport Division of the Western District requesting an additional thirty (30) day extension to file its objective criteria due to a conference having been arranged between the Justice Department and the Louisiana School Boards Association and its counsel for June 9, 1971, in Washington, which undersigned counsel for LSBA had agreed to. This extension was also granted by the Court below. (See Appendix F, page 43.)

The June 9, 1971, conference was held at the Justice Department in Washington and was attended, to the best of counsel's recollection, by Mr. David Norman and Mr. Edward Christenberry of the Justice Department, counsel for respondent herein, Mr. Stanley A. Halpin, Jr., one or two other attorneys representing plaintiffs in other Louisiana school cases, Mr. James D. Prescott, Executive Secretary of the Louisiana School Boards Association, and undersigned counsel. No final resolution of the objective criteria problem was reached, although counsel for the Justice Department seemed to understand the difficulty in devising any objective criteria to cover anything other than a pure *Singleton* situation, i.e., where there has to be a reduction in force of presumably competent teachers.

Shortly thereafter, on June 15, 1971, the Court below rendered its decision in *Smith v. Concordia Parish School Board*, 445 F.2d 285, which specifically directed the development of objective criteria to apply not only to a *Singleton* situation where a reduction in force becomes necessary due to converting to a unitary system, but to dismissals and demotions for cause as well. This was the first time that any Court

had required the development of objective criteria to apply to dismissals for cause.

Upon becoming aware of this decision LSBA again conferred with school superintendents and personnel at Louisiana State University, as well as the Justice Department, with regard to this new and different directive. At the conclusion of these additional conferences, LSBA could only conclude that it was impossible to develop realistic objective criteria to apply in determining whether or not a particular teacher should be dismissed because of dishonesty and willful neglect of duty. It became obvious that the correctness of such dismissal could only be determined by examination of the facts and evidence presented to the School Board at a tenure hearing just as jury or a judge renders its decision on the facts and evidence presented to it.

In the meantime, on June 17, 1971, the District Court, pursuant to the June 15, 1971, mandate of the Court below, issued an order directing the School Board, plaintiffs and the Justice Department to submit non-racial objective criteria within fifteen (15) days. On July 1, 1971, the District Court extended the time for filing objective criteria until July 31, 1971.

In the meantime, respondent herein, Sammy Davis, Jr., had continued to serve as principal of the Ferriday Seventh Grade School during the 1970-71 school year. Mr. Davis, along with principals of three or four of the other larger schools, had been given $1,000.00 in cash by the School Board to start the drink and candy fund for his school. During the year these school accounts at every such school were the subject of a routine audit by the school board's internal auditor. The auditor found certain discrepancies in Mr. Davis' school fund

which indicated to him that a complete audit of the funds should be made, which was completed in April, 1971.

A copy of this audit was furnished to Mr. Davis with a request that he meet with the School Board at its regular meeting of May 6, 1971, to discuss the audit and the discrepancies with the Board. The meeting of May 6, 1971, was not a formal tenure hearing and no charges had yet been leveled against Mr. Davis. It was merely an investigative step to give Mr. Davis an opportunity to explain the discrepancies without the necessity for any formal charges being filed. Mr. Davis attended that meeting with his counsel, but his explanation of the discrepancies in the books and handling of the funds was completely unsatisfactory.

Due to Mr. Davis' unsatisfactory explanation of the initial discrepancies, a further investigation was made with regard to the handling of public funds under his control and supervision. In June, 1971, the Court below was advised by defendant's legal counsel, District Attorney W. D. Falkenheiner, of the investigation into the conduct of Mr. Davis and that it was possible that the investigation would result in charges being filed against Mr. Davis under the Louisiana Teacher Tenure Law and that **if there was objection to that procedure the Board was willing to try the matter, ab initio, in the District Court.** However, the Court indicated that as this was not a desegregation matter, the Board was proceeding properly under the Teacher Tenure Law.

The investigation continued and, as a result, detailed charges were prepared and served on Mr. Davis in early August, 1971, with notice that a tenure hearing would be conducted under the Tenure Act on August 27, 1971. (See Appendix G, page 47.)

On August 16, 1971, Respondent Davis filed a motion asking the Court to restrain and enjoin the School Board from proceeding with the tenure hearing. However, on August 18, 1971, the Court below issued its ruling denying respondent's motion for an injunction and advising the Board that it was proceeding properly. (See Appendix H, page 55.)

The School Board then proceeded with its plans to hold separate tenure hearings for Mr. Davis and two other teachers during the period from August 27, 1971, to September 2, 1971. As a result of these tenure hearings, Sammy Davis, Jr., was dismissed after having been found guilty by the Board of **three of four charges of willful neglect of duty, incompetency, and dishonesty.** Cleveland Watts, a black teacher, was found **not guilty of willful neglect of duty and incompetency** by the Board and is still teaching in the Concordia Parish school system. Jean Fleming, a white teacher, was found **guilty of incompetency** on the recommendation of her **black principal** and was dismissed. Mrs. Fleming appealed the School Board's decision to the State District Court which affirmed the School Board in dismissing her with the District Court decision being affirmed on appeal in *Fleming v. Concordia Parish School Board*, 275 So.2d 795.

On August 31, 1971, the District Court instructed the Clerk to make the following minute entry in this case,

> "**The U. S. of America** is hereby granted an additional thirty days from this date within which to file OBJECTIVE CRITERIA." (Emphasis added)

On September 1, 1971, plaintiffs filed a memorandum incorporating their suggested objective criteria. (See Appendix I, page 63.) On September 2, 1971, the School Board filed its objective criteria. The United States filed its proposed ob-

jective criteria on September 30, 1972. (See Appendix J, page 67.) On September 2, 1971, the Clerk was instructed by the Court below to make the following minute entry:

> "IT IS DIRECTED BY THE COURT that when all parties have filed their proposed criteria concerning non-discriminatory, non-racial objective criteria to govern both faculty reduction and dismissals for cause that the respective attorneys meet with one another at the earliest possible date and attempt mutually to arrive upon terms of a consent decree regarding such questions. **This, of course, does not refer to matters involving dismissal actions for cause to be taken by the School Board unconnected with desegregation of the schools, where the provisions of the Louisiana Teacher Tenure Law, LSA-R.S. 17:443, et seq, is applicable."** (Emphasis added)

The District Court has not, to this date, ever approved any particular objective criteria.

Respondent Davis took no further action herein until June 12, 1972, almost one year later, when he filed a motion for further relief seeking reinstatement because of the lack of Court approved criteria.

None of the documents attached hereto as Appendix C through J were included in the record that was forwarded to the Court below by the District Court Clerk. Petitioner filed its application for rehearing in the Court below but such motion was denied.

Plaintiff's motion for supplemental relief and summary judgment was heard by the Court on September 1, 1972, after which, on that same date, the Court below issued its judgment ordering the reinstatement of Mr. Davis primarily because the School Board had not filed its objective criteria until Sep-

tember 2, 1971, a few days after Mr. Davis was dismissed. (See Appendix A, page 21.) In ordering Mr. Davis reinstated the Court below said:

> "The failure of the Board to develop and obtain court approval of objective criteria **before** Mr. Davis' hearing would alone as a matter of law entitle him to reinstatement. *Rauls v. Baker County Board of Education* (5th Cir., en banc, 1971), 445 F.2d 825 and *Cornist v. Richland Parish* (W.D. La. ND 16,322)."

Defendants timely noticed their appeal from that judgment which resulted in this Court's judgment of April 24, 1974, affirming the judgment of the Court below and ordering Mr. Davis reinstated because of the failure of the School Board to have filed the objective criteria prior to his dismissal. (See Appendix B, page 23.)

REASONS FOR GRANTING THE WRIT

I. The decision of the Court below is in direct conflict with principles established by this Court in its recent decisions in *Board of Regents v. Roth*, 1972, 408 US 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 and *Perry v. Sindermann*, 1972, 408 US 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570.

Roth and *Sindermann*, together, established the principle that a non-tenured teacher could be terminated for any reason except where such termination infringed on a constitutionally protected "property interest" or amounted to a deprivation of "liberty" within the meaning of the due process clause in which case the teacher must be given a due process hearing and that a tenured teacher could be dismissed after being given a due process hearing.

The decision of the Court below holds, in effect, that

neither a non-tenured teacher, nor a tenured teacher, can be dismissed for willful neglect of duty and dishonesty involving the misuse and misappropriation of public funds and equipment, even after a full due process hearing at which the teacher is represented by counsel, unless a Federal District Court had previously approved some so-called "objective criteria" by which such dismissal was determined. And, such ruling was made in spite of the fact that the "objective criteria" filed by respondent's counsel and the United States admitted that there are no "objective criteria" which would have relevance, or be applicable to, this dismissal for cause.

II. In addition, that portion of the decision of the Court below which awards back pay to respondent, is prohibited by the Eleventh Amendment of the United States Constitution and is in direct conflict with the recent decision of this Court in *Edelman v. Jordan*, ____ US ____, 39 L.Ed. 2d 662, 94 S.Ct. ____ (March 25, 1974), where this Court held that the Eleventh Amendment to the Constitution prohibited awards requiring the use of ". . . state funds to make reparation for the past . . ."

Louisiana's teacher salary schedule is established by the State Legislature in L.R.S. 17:421, et seq, and the Legislature by direct appropriation to the State Department of Education who then distributes such funds to the respective school boards by formula, provides all funds for such salary schedule. Thus, such award of back pay comes directly from the State Treasury in contravention of *Edelman*.

III. The decision of the Court below virtually emasculates, if not outright repeals, prior decisions of that same Court in *Lee v. Roanoke City Board of Education, et al* ____ F.2d ____, (CA 5, 72-1656, June 28, 1972); *Thompson v. Madison County Board of Education*, 476 F.2d 676 (March

13, 1973) reaffirmed in *Thompson v. Madison County Board of Education*, ____ F.2d. ____ (No. 73-3509, CA 5, June 20, 1974, page 4874); *Robinson v. Jefferson County Board of Education, et al*, ____ F.2d. ____ (No. 73-2134, CA 5, October 23, 1973).

In *Lee*, the Court below held that a black teacher must be reinstated and given tenure rights when she was terminated without a hearing and without the use of non-racial objective criteria ". . . as a result of a desegregation order . . ." in violation of its decision in *Singleton*, supra. However, the Court went on to clearly hold that a school board could dismiss an incompetent or unqualified teacher under applicable state tenure laws when it said:

> "We do not, by our decision, require the Board to retain an unqualified or incompetent teacher . . . We require only that these proceedings be conducted in accordance with her rights as a tenured teacher under Alabama law. . . ."

In *Robinson v. Jefferson County Board of Education*, et al, ____ F. 2d ____ (No. 73-2134, CA 5, October 23, 1973) the Court below permitted, in a school system in the midst of the desegregation process, to dismiss a non-tenured white teacher charged with (1) incompetent performance in the classroom, (2) use of profanity in the classroom, and (3) inability to relate to ninth grade students, without a due process hearing in spite of her contention that she was dismissed for exercise of her constitutionally First Amendment rights of free speech and without any discussion whatsoever of the so-called "objective criteria."

In *Thompson v. Madison County Board of Education*, 476 F. 2d 676 (March 13, 1973) reaffirmed after remand in ____

F.2d ____ (No. 73-3509, CA 5, June 20, 1974, page 4874) the Court below held that although a teacher could not be dismissed for "incompetent performance in the classroom" without the use of so-called "objective criteria" it still specifically held that a teacher could be dismissed ". . . without reference to the school board's pre-established objective and reasonable standards . . ." where the teacher was guilty of . . .

> "types of conduct that are repulsive to the minimum standards of decency—such as honesty and integrity—resuired by virtually all employers of their employees, and **especially required of public servants such as school teachers** . . . ." (Emphasis added)

The Court below then went on to say,

> "For example, if a teacher came to school drunk, or **was found stealing from the school treasury,** or sexually assaulted a student, **the school board could substantiate on 'just cause' grounds its firing of that teacher, even though the school system was still in the process of desegregation and whether or not the school board had established any SINGLETON criteria for discharge or demotion.**" (Emphasis added)

This is exactly what occurred in this case. Respondent Davis was found guilty by the School Board of three of four counts of willful neglect of duty and dishonesty in the misuse and mismanagement of public funds and equipment entrusted to his care after a full due process hearing at which he was represented by counsel. (See Appendix G, page 47.) Yet, the Court below now says he must be reinstated, with back pay, because the Board did not have Court approved "objective criteria" at the time respondent was dismissed.

IV. The decision of the Court below either invalidates or emasculates Louisiana's long standing Teacher Tenure Law,

Louisiana Revised Statutes, Title 17, Sections 441 through 444, and overturns a long line of Louisiana jurisprudence including particularly *Fleming v. Concordia Parish School Board*, 275 So. 2d 795 and *Blanchet v. Vermillion Parish School Board*, 220 So. 2d 534.

Louisiana has a very liberal Teacher Tenure Law. It provides that a teacher first serves a probationary period of three years, during which time she may be dismissed by the Board only upon the written recommendation of the Superintendent. (LRS 17:442) It then provides that she becomes a tenured teacher at the expiration of the probationary period after which she may be dismissed only on grounds of (1) incompetency (2) willful neglect of duty and (3) dishonesty and only after a full due process hearing of which she was given a complete statement of the charges against her, at least fifteen (15) days notice of such hearing, at which she may be represented by counsel and call witnesses and which may be public or private or her option. (LRS 17:443)

In *Blanchet* the Louisiana Supreme Court affirmed the dismissal of a teacher dismissed by the school board in accordance with the Teacher Tenure Law on grounds of willful neglect of duty for refusing to obey a regulation of the school board requiring teachers to wear a shirt and tie in the classroom. This decision of the Supreme Court clearly appears to have been overruled by the decision of the Court below.

More importantly, perhaps, the *Fleming* case involved the dismissal of Mrs. Fleming by petitioner here in the same week that Respondent Davis was dismissed by petitioner. Mrs. Fleming, a white teacher of many years' experience, was recommended for dismissal by the superintendent on grounds of incompetency based upon the recommendation of Mrs. Fleming's black principal. However, instead of going to Federal

Court, Mrs. Fleming utilized her right of appeal to the state courts provided by Louisiana's Teacher Tenure Law and her dismissal by the board, after a tenure hearing, was affirmed by the Louisiana Supreme Court. It would appear that if Mr. Davis must be reinstated because of a lack of court approved "objective criteria" at the time of his dismissal, Mrs. Fleming should certainly also be reinstated.

V. Furthermore, the decision of the Court below sanctions such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In the summer of 1971 when Respondent Davis was notified of the Board's proposed tenure hearing to consider his dismissal, he filed a motion with the United States District Court requesting that the Board be enjoined from dismissing him or holding the tenure hearing. After a hearing at which petitioner's then counsel, the District Attorney, informed the Court that if it preferred, the Board was willing to try Respondent Davis, ab initio, in the District Court, the Court issued its decision refusing to grant the injunction and advising the Board that the District Court felt the Board was following the correct procedure in utilizing the state tenure law. (See Appendix H, page 55.) The Board then proceeded with its tenure hearing and the resultant dismissal of Respondent Davis. Respondent Davis took no further action, exercised none of his rights of appeal to the state Courts granted by the tenure law, and did not even go to the Federal Courts until almost a year later in June, 1972 when he successfully utilized the "lack of objective criteria" argument by having the District Court order his reinstatement for lack of such criteria. And even this, in spite of the Board's having previously filed "objective criteria" suggested by the District Court itself in its letter of February 15, 1970. (See Appendices C and D.)

Thus, the decision of the Court below sanctions action of the District Court which penalizes petitioner for doing exactly what the District Court directed it to do in total departure from the accepted and usual course of judicial proceedings.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

John F. Ward, Jr.
Counsel for Petitioners

CERTIFICATE

I, John F. Ward, Jr., attorney for petitioners and a member of the Bar of the United States Supreme Court, do hereby certify that on this 22nd day of July, 1974, I served copies of the foregoing Petition for Writ of Certiorari on the attorney of record for respondent herein, Mr. Stanley A. Halpin, Jr., by mailing three copies of same, postage prepaid, to him at his offices at 906 Carondelet Building, 226 Carondelet Street, New Orleans, Louisiana 70130.

John F. Ward, Jr.
Counsel for Petitioners

APPENDIX A

(Title Omitted)

No. 11,577

JUDGMENT

Prior to the beginning of the 1970-71 term defendant School Board dismissed and demoted some twenty (20) Black educators, including Principal Sammy Davis, Jr., without development and promulgation of objective criteria as required by *Singleton v. Jackson Municipal Separate School District*, 5th Cir. 1969, 419 F. 2d 1211. By order of September 3, 1971, this Court reinstated those Black educators, including Mr. Davis. On June 15, 1971, the United States Court of Appeals affirmed this order, and called for the submission of proposed objective criteria by all parties to this Court. In August, 1971, the Defendant Board again sought to dismiss Mr. Davis and he was given a hearing before the School Board as it was constituted at that time. On September 2, 1971, defendant filed their proposed objective criteria and on the same date entered its decision dismissing Mr. Davis.

The failure of the Board to develop and obtain court approval of objective criteria **before** Mr. Davis' hearing would alone, as a matter of law, entitled him to reinstatement. *Rauls v. Baker County Board of Education* (5th Cir. en banc, 1971), 445 F.2d 825 and *Cornist v. Richland Parish* (W.D. La. No. 16,322).

However, there is here an alternate ground which as a matter of law the Court also finds entitles Mr. Davis to reinstatement. That ground is that Negroes were systematically excluded from the Board which served as a hearing body to determine the charges against Mr. Davis. This Court takes judicial notice of the proceedings in *Wactor v. McKeithen* (W.D. La. No. 12663) which this Court by order of August 13, 1971 found that the scheme of selecting the Concordia

Board excluded Negroes from membership. Since that time, a new Board has been selected under the racially fair plan approved by this Court, and two Negroes now serve on the School Board and two Negroes serve on the Police Jury (including Mr. Davis).

When educators are reinstated after improper dismissal, they are entitled to back pay as a matter of course. *Rauls v. Baker County Board of Education*, 5th Cir., en banc 1971 and *Cornist v. Richland Parish* (W.D. La. No. 16,322).

For the foreging reasons, based upon the record of proceedings in this case, plaintiffs are entitled to an injunction as a matter of law.

IT IS THEREFORE ORDERED that defendants immediately reinstate Mr. Sammy Davis, Jr., as principal in the Concordia School system with full salary benefits and responsibilities and that defendants immediately award Mr. Davis back pay from the date of his dismissal to the date of his reinstatement by this Order.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 1st day of September, 1972.

/s/ Ben C. Dawkins, Jr.
UNITED STATES DISTRICT JUDGE

Filed
Sept. 1, 1972

APPENDIX B

Irma J. SMITH et al., Plaintiffs-Appellees,

United States of America, Plaintiff-Intervenor,

v.

CONCORDIA PARISH SCHOOL BOARD et al., Defendants-Appellants.

No. 72-2069.

United States Court of Appeals, Fifth Circuit.

April 24, 1974.

Dismissed teacher brought suit against school board seeking reinstatement. The United States District Court for the Western District of Louisiana, at Monroe, Benjamin C. Dawkins, Jr., J., ordered immediate reinstatement with full salary benefits, responsibilities and back pay from the date of the dismissal, and school board appealed. The Court of Appeals held that where, on June 15, 1971, it had affirmed District Court order directing that all black educators be reinstated and further required that the board submit, within 15 days, nonracial objective criteria to cover both faculty reduction and dismissals for cause, and where an extension of time was thereafter granted the board to allow submission of the criteria, it was improper for the board, during that extension, to find plaintff to be unfit and dismiss him for cause under the Louisiana Teachers' Tenure Act.

Remanded with directions.

See also, D.C., 331 F.Supp. 330.

Schools and School Districts ⇐ 141(5)

Where, on June 15, 1971, Court of Appeals affirmed district court order directing that all black educators be reinstated and further required that school board submit, within 15 days, nonracial objective criteria to cover both faculty

reduction and dismissals for cause, and where an extension of time was thereafter granted the board to allow submission of the criteria, it was improper for the board, during that extension, to find teacher to be unfit and dismiss him for cause under the Louisiana Teachers' Tenure Act. LSA-R.S. 17:441-17:444.

Appeal from the United States District Court for the Western District of Louisiana.

Before TUTTLE, GODBOLD and MORGAN, Circuit Judges.

PER CURIAM:

Prior to the beginning of the 1970-71 school term, the Concordia Parish (Louisiana) School Board dismissed or demoted 20 black educators, including appellee Davis. The board acted without developing and promulgating objective criteria, as required by this court in Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1969), rev'd on other grounds, Carter v. West Feliciana School Board, 396 U.S. 290, S.Ct. 608, 24 L.Ed.2d 477 (1970). The Federal District Court for the Northern District of Louisiana ordered all the black educators reinstated. On June 15, 1971, this court affirmed that order and further required that the board ". . . submit, within 15 days, non-discriminatory, non-racial objective criteria to cover both faculty reduction and *dismissals for cause.*" [Emphasis added.] Smith v. Concordia Parish School Board, 445 F.2d 285 at 286 (5th Cir. 1971).

In August of 1971, the school board held a hearing and found that Davis should be dismissed for alleged mismanagement of school funds. On September 2, 1971, the board filed proposed objective criteria under *Singleton, supra*, after having been granted an extension by the district court. The same day, the board entered its decision dismissing Davis. The dis-

trict court ordered immediate reinstatement of Davis with full salary benefits, responsibilities and back-pay from the date of his dismissal. The school board now appeals that order. It argues that at the time of the dismissal the district court had not approved any objective criteria filed by the board in accordance with *Singleton*; therefore, the board could dismiss Davis for cause under the Louisiana Teachers' Tenure Act (LRS 17:441-17:444).

We find this argument unacceptable. A 30-day extension had been granted the school board to allow submission of the *Singleton* criteria. It was during that extension that Davis was found to be unfit by the board. This tactic cannot be allowed. Even though the board complied with the Louisiana Teachers' Tenure Act, it did not comply with the order of this court. A delay in obtaining approval for *Singleton* criteria, even when due only partially to action of the board, cannot be used to justify failure to comply with this court's order of June 15, 1971.

We agree with the district court that Davis should be immediately reinstated. Further consideration, however, should be given possible mitigation of the back-pay award. See, Horton v. Lawrence County Board of Education, 449 F.2d 793 (5th Cir. 1917) and Bhargave v. Cloer, 355 F.Supp. 1143 (N.D.Ga.1972).[1]

This case is remanded for reinstatement of Mr. Davis and exact determination by the district court of the dollar amount of the back-pay award.

---

1. The pertinent part of Judge Edenfield's opinion in *Bhargave* says, "Nevertheless plaintiff is entitled to that portion of her wages for the 1970-71 school year which have not been paid to her, less any wages earned by plaintiff which might be applied in mitigation." *Supra* at 1146.
Therefore, the district court should determine the amount of the back-pay award due Mr. Davis, minus other salary he earned which might have mitigated the award.

Adm. Office, U. S. Courts—West Publishing Company, St. Paul, Minn.

APPENDIX C

UNITED STATES DISTRICT COURT
Western District of Louisiana

BEN C. DAWKINS, JR.
Chief Judge
Shreveport, Louisiana 71102

February 15th, 1971

TO ALL SCHOOL BOARDS IN THE SHREVEPORT AND MONROE DIVISIONS OF THIS COURT:

Gentlemen:

We enclose copies of "Statement of Objective Nonracial Criteria" filed by the Sabine Parish School Board and the Criteria filed by the West Carroll Parish School Board; and it is suggested that your Board probably would want to adopt a similar form of compliance with our Court orders heretofore entered.

This should be done at the earliest possible date.

Very truly yours,

/s/ Ben C. Dawkins, Jr.
Ben C. Dawkins, Jr.
Chief Judge

BCDjr:mf
Enclosures

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

MITCHELL WILLIAM,
ET AL, Plaintiff

VERSUS

SABINE PARISH SCHOOL
BOARD, ET AL, Defendant

CIVIL ACTION NO. 14,519
STATEMENT OF OBJECTIVE
NONRACIAL CRITERIA

Pursuant to the orders of this Honorable Court dated September 18, 1970, and October 8, 1970, and *Singleton vs. Jackson Municipal Separate School Dist.*, 419 F.2d 1211 (CA 5th Cir. 1970) at page 1218, requiring the defendant School Board to adopt and publish "nonracial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. . . ." where a reduction in force of the faculty and professional staff of the school system has been made necessary due to conversion to a unitary school system in compliance with the orders of this court, the Sabine Parish School Board has adopted and hereby submits and files the following statement of such nonracial objective criteria, to-wit:

1.

In its personnel and staffing policies and procedures the Sabine Parish School Board shall afford equal opportunity to equally qualified individuals regardless of race, color, religion, or national origin.

2.

If there is to be a reduction in the number of principals, teachers, teacher aides or other professional staff members employed by the Sabine Parish School Board resulting from conversion to a unitary school system in compliance with court orders, which will result in a dismissal or demotion of any such staff members the staff members to be dismissed or

demoted shall be selected on the basis of objective and reasonable non-discriminatory standards among all the staff members of the school system. Such objective and non-discriminatory standards shall consist of the careful application of the Louisiana Teacher Tenure Law and its requirements without regard to race, color, religion or national origin.

WHEREFORE, this statement is respectfully submitted for filing and the defendants respectfully pray that the same be deemed sufficient compliance with the aforesaid judicial mandates.

Respectfully submitted:

SABINE PARISH SCHOOL BOARD

BY: /s/ Homer Martinez
Homer Martinez, President

BY: /s/ L. B. Skinner
L. B. Skinner, Superintendent

Appearance:

J. REUEL BOONE
District Attorney
Eleventh Judicial District
Many, Louisiana

THOMAS A. SELF
Assistant District Attorney
Eleventh Judicial District
Many, Louisiana
ATTORNEYS FOR SABINE PARISH SCHOOL BOARD

BY: /s/ Thomas A. Self
Thomas A. Self
Assistant District Attorney

CERTIFICATE

I hereby certify that a copy of the foregoing pleading has been served by mailing a copy to Donald Soileau, Attorney at Law, P. O. Box 70, Mamou, Louisiana, Counsel for Plaintiffs, by United States Mail, postage prepaid at Many, Louisiana, this 11th day of February, 1971.

/s/ Thomas A. Self
COUNSEL

WEST CARROLL PARISH SCHOOL BOARD
OAK GROVE, LOUISIANA
JANUARY 20, 1971

DISMISSALS AND DEMOTIONS CAUSED BY COURT ORDERED CONVERSION TO A UNITARY SYSTEM.

As of this date, the West Carroll Parish School Board has not dismissed nor demoted any staff member as a result of conversion to a unitary school system nor does it forsee that this will be necessary in the immediate future. However, in order to comply with the directive of the United States District Court, Western District of Louisiana, issued October 8, 1970, that Non-racial objective criteria be adopted for the dismissal or demotion of staff members, we respectfully submit the following criteria:

(1) Any dismissal or demotion will be done in a manner to comply with all previous orders of the United States District Court, Western District of Louisiana.

(2) Professional competencies as measured and rated by objective supervisory instruments will be used by those employees of the School Board charged with evaluating teacher effectiveness. These instruments will be used as a part of the basis of the decisions made in determining which teachers will be dismissed as a result of establishing a unitary school system.

(3) Temporarily certified teachers will be dismissed prior to the dismissal of a certified teacher taking into account the School Boards needs in the field of certification and teacher competence.

(4) All demotion or dismissal actions to dismiss staff members, whose dismissal is a result of conversion to a court ordered unitary school system shall be supported by valid and prejudice-free written evaluative reports.

(5) The West Carroll Parish School Board recognizes that competency may change and submits to the court that it would desire to dismiss or demote the least competent teachers (as determined by evaluation reports) prior to the dismissal of those judged to be more competent.

/s/ W. L. Gwin
W. L. Gwin, President
WEST CARROLL PARISH
SCHOOL BOARD

/s/ A. C. Fryday
A. C. Fryday, Secretary
WEST CARROLL PARISH
SCHOOL BOARD

APPENDIX D

Clerk
United States District Court
Western District of Louisiana
United States Courthouse
Shreveport, Louisiana

Re: Irma J. Smith, et al., Plaintiffs,
United States of America,
Plaintiff-Intervenor
v.
Concordia Parish School Board, et al.,
Defendants
Civil Action No. 11,577

Dear Sir:

Enclosed herewith is the Response of Concordia Parish School Board adopting non-racial objective criteria pursuant to a joint Order of September 18, 1970.

Very truly yours,

W. C. FALKENHEINER

WCF:sal

cc: Judge B. C. Dawkins, Jr.

It was moved by Mr. Bamburg, seconded by Mr. Jacobs that the following resolution be adopted:

RESOLUTION

WHEREAS, this Board, pursuant to the obligations imposed upon it by the Singleton decision, adopted non-racial objective criteria for use in its faculty adjustments; and,

WHEREAS, the criteria used by this Board was severely criticized by the United States District Court at the hearings in the Court in Shreveport in August, 1970; and,

WHEREAS, a letter dated February 15, 1971, has been received from that Court with two approved forms of objective criteria; and,

WHEREAS, the Board remains of the opinion that its original criteria satisfies all of the requirements of Singleton but, nevertheless, desires to fully comply with the Court's wishes; now,

THEREFORE, BE IT RESOLVED by the Concordia Parish School Board, that the original objective criteria be supplemented by adopting the following non-racial objective criteria for the dismissal or demotion of staff members, and employees, as follows:

(1) Any dismissal or demotion will be done in a manner to comply with all previous orders of the United States District Court, Western District of Louisiana.

(2) Professional competencies as measured and rated by objective supervisory instruments will be used by those employees of the School Board charged with evaluating teacher effectiveness. These instruments will be used as a part of the basis of the decisions made in determining which teachers will be dismissed as a result of establishing a unitary school system.

(3) Temporarily certified teachers will be dismissed prior

to the dismissal of a certified teacher taking into account the School Board's needs in the field of certification and teacher competence.

(4) All demotion or dismissal actions to dismiss staff members, whose dismissal is a result of conversion to a court ordered unitary school system shall be supported by valid and prejudice-free written evaluative reports.

(5) The Concordia Parish School Board recognizes that competency may change and submits to the court that it would desire to dismiss or demote the least competent teachers (as determined by evaluation reports) prior to the dismissal of those judged to be more competent.

BE IT FURTHER RESOLVED that the District Attorney be requested to furnish a copy of this resolution to the United States District Court in compliance with its order.

The vote on this resolution was as follows: YEAS—Bion Bamburg, J. W. Calhoun, J. T. Jacobs, Raymond L. Keathley, Mack Knapp, Paul D. Reed, Billy Rucker, Gilbert Savoy, and Vernon M. White; NAYS—None; and the resolution was declared adopted this, the 4th day of March, 1971.

/s/ Ben L. Green, Jr.
Ben L. Green, Jr., Secretary

/s/ J. W. Calhoun
J. W. Calhoun, President

I, Ben L. Green, Jr., Secretary of Concordia Parish School Board, do hereby certify that the above resolution is a true and correct copy of a resolution adopted by Concordia Parish School Board at a regular meeting held on the 4th day of March, 1971.

This the 4th day of March, 1971.

/s/ Ben L. Green, Jr.
Ben L. Green, Jr., Secretary
Concordia Parish School Board

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

IRMA J. SMITH, et al.,	)	
	)	
Plaintiffs,	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Intervenor,	)	CIVIL ACTION
	)	NO. 11,577
v.	)	
	)	
CONCORDIA PARISH SCHOOL BOARD, et al.,	)	
	)	
Defendants.	)	
	)	

RESPONSE OF CONCORDIA PARISH SCHOOL BOARD TO THE JOINT ORDER OF ALL JUDGES OF THE WESTERN DISTRICT OF LOUISIANA OF SEPTEMBER 18, 1970

Now into Court, through its undersigned counsel, comes the Concordia Parish School Board and responds to the September 18, 1970 joint Order of the Court regarding the filing of racially non-discriminatory objective criteria with regard to the dismissal or demotion of faculty where a reduction in force is necessary due to conversion to a unitary school system (see *Singleton v. Jackson Municipal Separate School District*, 419 F. 2d 1211, Fifth Circuit, 1969 cert. denied ____ U.S. _____, 90 S. Ct., _____ 1970) as follows:

> The Concordia Parish School Board at a regular meeting on 4 March, 1971 adopted the annexed resolution approving non-racial objective criteria similar to that previously approved by this Honorable Court for West Carroll Parish.

WHEREFORE, respondent respectfully prays that this

response be deemed good and sufficient and complete satisfaction of the September 18, 1970 Order of the Court.

Respectfully submitted,

W. C. FALKENHEINER,
Attorney for Respondent
P. O. Box 308
Vidalia, Louisiana 71373

CERTIFICATE

I certify that a copy of the above and foregoing Answer has this day been served on the following counsel of record by depositing a copy thereof in the United States Mail, postage prepaid, as follows:

Mr. George M. Strickler, Jr.
Mr. Stanley Halpin, Jr.
Suite 304, 606 Common Street
New Orleans, Louisiana 70130

Mr. Ed Christenberry
Department of Justice
Civil Rights Division
Washington, D.C. 20530
Attorneys for appellees,

Mr. John Dale Powers
P. O. Box 1588
Baton Rouge, Louisiana 70821
Attorney for Louisiana
Teachers' Association, Amicus
Curiae

Vidalia, Louisiana, this 5th day of March, 1971.

W. C. FALKENHEINER

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

IRMA J. SMITH, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
UNITED STATES OF AMERICA,	)	NO. 11,577
	)	
Plaintiff-Intervenor,	)	
	)	
v.	)	
	)	
CONCORDIA PARISH SCHOOL	)	
et al.,	)	
Defendants.	)	

UNITED STATES' RESPONSE TO DEFENDANTS' PROPOSED FACULTY EVALUATION CRITERIA

The United States hereby enters its objection to the proposed faculty evaluation criteria filed by the defendant school board pursuant to this Court's order of September 19, 1970 and October 8, 1970 and moves the Court for the entry of an order granting the United States leave to file, within thirty (30) days, suggested possible objective criteria for the dismissal or demotion of faculty and staff personnel.

In support of this motion the United States shows to the Court as follows:

1. The United States Court of Appeals for the Fifth Circuit required in its order in *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir., 1969) that "[i]f there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed

by the school district which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school district."

2. The response filed by the defendant school board, though stating the Board's intent to comply with the orders of the Courts, fails to promulgate and list specific objective standards as directed by this Court's order.

WHEREFORE, the plaintiff prays that this Court enter an order granting the United States leave to file, within thirty (30) days, suggested possible objective criteria for the dismissal or demotion of faculty and staff personnel, and that at the conclusion of this allotted time, setting the matter down for an evidentiary hearing.

Respectfully submitted,

JERRIS LEONARD
Assistant Attorney General

DONALD E. WALTER
United States Attorney

/s/ Ben L. Krage
EDWARD S. CHRISTENBURY
BEN L. KRAGE
Attorneys
Department of Justice
Washington, D. C. 20530

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

IRMA J. SMITH, et al.,	)	
	)	
Plaintiffs,	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	CIVIL ACTION
Plaintiff-Intervenor,	)	NO. 11,577
	)	**ORDER**
v.	)	
	)	
CONCORDIA PARISH SCHOOL et al.,	)	
Defendants.	)	

The Court, having considered the defendant school board's proposed faculty evaluation criteria and the response thereto by the United States and the United States' request for leave to file within thirty (30) days suggested possible criteria for the Court's consideration, and being of the opinion that the request of the United States is well taken, it is therefore

ORDERED

That the United States is granted leave to file, within thirty (30) days of the entry of this Order, suggested objective criteria for faculty and staff evaluation.

The Court shall set an evidentiary hearing for determination of appropriate non-racial objective criteria after receipt of the United States' suggestions.

THUS DONE and SIGNED THIS ____ day of April, 1971.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the foregoing Response to Defendants' Proposed Faculty Evaluation Criteria upon counsel for all parties, by mailing same, postage prepaid, to:

W. C. Falkenheiner
Attorney at Law
P. O. Box 308
Vidalia, Louisiana 71373

Mrs. George M. Strickler, Jr.
Mr. Stanley Halpin, Jr.
Suite 304, 606 Common Street
New Orleans, Louisiana 70130

Mr. John Dale Powers
P. O. Box 1588
Baton Rouge, Louisiana, 70821

This the 16th day of April, 1971.

/s/ Ben L. Krage
BEN L. KRAGE
Attorney
Department of Justice
Washington, D. C. 20530

APPENDIX F

MOTION FOR EXTENTION OF TIME TO FILE SUGGESTED OBJECTIVE FACULTY EVALUATION CRITERIA

The United States, plaintiff and plaintiff-intervenor in the above styled and numbered cases, hereby moves this Court for an extention of thirty (30) days within which to file suggested objective criteria for faculty evaluation. In support of this motion the United States would show as follows:

1. On April 15, 1971, the United States filed a response to the proposed faculty evaluation criteria submitted by the defendant school boards in these cases and requested the Court to grant the United States 30 days within which to file suggested criteria

2. On April 29, 1971, this Court granted the United States' request and required the submission of suggested criteria within 30 days.

3. Subsequent to the Court's April 29, 1971, Order, attorneys for the United States were contacted by counsel for the Louisiana State School Board association proposing a conference with counsel prior to the submission of suggested criteria by the United States. A conference between attorneys of the Department of Justice and the Executive Secretary of the Louisiana State School Board Association and the Association's counsel, Mr. John Ward, has been scheduled for June 9, 1971.

4. This motion for extention of time has been agreed to by counsel for the Louisiana State School Board Association, Mr. John Ward, who also represents several of the defendant school boards in these cases.

WHEREFORE, the United States respectfully requests the Court to grant this motion and to enter the attached order.

DONALD E. WALTER
United States Attorney

DAVID L. NORMAN
Acting Assistant Attorney General

/s/ Ben L. Krage
EDWARD S. CHRISTENBURY
BEN L. KRAGE
Attorneys
Department of Justice
Washington, D.C. 20530

ORDER

The Court, having considered the United States' motion for an extension of time of thirty (30) days within which to file suggested faculty evaluation criteria, and the Court being of the opinion that the request of the United States is well taken and that good cause therefor has been shown, it is therefore

ORDERED

That the United States is granted an extension of time of thirty (30) days from the date of this order within which to file suggested objective criteria for faculty and staff evaluation.

THUS DONE and SIGNED this _____ day of _____, 1971.

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the

foregoing Motion for Extension of Time to File Suggested Objective Faculty Evaluation Criteria upon counsel for all parties, by mailing same, postage prepaid, to:

Hal R. Henderson
District Attorney
Second Judicial District
Arcadia, Louisiana

George M. Strickler, Jr.
606 Common Street
New Orleans, Louisiana

Frank Voelker, Jr.
405 Morgan Street
Lake Providence, Louisiana

Robert W. Kostelka
District Attorney
4th Judicial District
Monroe, Louisiana 71201

J. Bennett Johnston, Jr.
406 Lane Building
Shreveport, Louisiana 71101

James J. Thornton, Jr.
Attorney at Law
406 Lane Building
Shreveport, Louisiana 71101

W. C. Falkenheiner
Office of District Attorney
Seventh Judicial District
P. O. Box 308
Vidalia, Louisiana 71373

William R. Coener
Assistant District Attorney
Fifth Judicial District
Rayville, Louisiana

E. Rudolph McIntyre
5th Judicial District
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Winnsboro, Louisiana 71295

George Griffing
Assistant District Attorney
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Sam L. Wells
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Harry J. Kron, Jr.
202 Audubon Street
Thibodaux, Louisiana 70301

Thomas L. Clarke
District Attorney
Sixth Judicial District
P. O. Box 108
St. Joseph, Louisiana 71366

Jesse N. Stone, Jr.
1116 Pierre Avenue
Shreveport, Louisiana 71103

John R. Pleasant
1004 Mid South Towers
P. O. Box 1818
Shreveport, Louisiana 71102

Thomas A. Self
Assistant District Attorney
11th Judicial District
Many, Louisiana

This the 26th day of May, 1971.

/s/ Ben L. Krage
BEN L. KRAGE
Attorney
Department of Justice
Washington, D. C. 20530

APPENDIX G

CONCORDIA PARISH SCHOOL BOARD
Ben L. Green, Jr., Superintendent
Vidalia, Louisiana 71373

August 9, 1971

Mr. Sammy Davis, Jr.
P. O. Box 444
Ferriday, La. 71334

Dear Mr. Davis:

Written and signed charges of wilful neglect of duty, incompetency, and dishonesty have been preferred against you by Mr. Ben L. Green, Jr., Supt. of Concordia Parish School system. A copy of these charges is attached to this letter as required by law.

You are further advised that a hearing of these charges will be held at nine (9:00) o'clock a.m., on the 27th day of August, 1971, at the Concordia Parish School Board Office in Vidalia, Louisiana. If you are found guilty of these charges, you may be removed from your position or otherwise disciplined. This hearing may be public or private, at your option, and you will have the right to appear with witnesses and counsel according to law.

For your further information, I am furnishing you herewith a copy of R.S. 17:443 pursuant to which these proceedings will be conducted.

Yours truly,
/s/ Ben L. Green, Jr.
Ben L. Green, Jr.
Superintendent

BLGJr/myl
Enclosures

August 9, 1971

CHARGES AGAINST SAMMY DAVIS, JR., PRINCIPAL OF FERRIDAY 7th GRADE SCHOOL

COUNT 1: Sammy Davis, Jr., while principal of the Ferriday 7th Grade School, and for the school year beginning September, 1970, was guilty of wilful neglect of duty and incompetence by violating his duties with respect to keeping accurate financial records applicable to the public funds administered by him, as shown in the audit of Clayton Starling dated March 25, 1971, a copy of which is annexed and made a part of this charge, in violation of his responsibilities and duties as set out in Paragraph O. of the Concordia Parish Handbook, Page 49, Bulletin #741, Handbook for School Administrators, State Dept. of Education of Louisiana, Resolutions of Concordia Parish School Board dated July 3, 1969, and August 17, 1970, and verbal instructions from the Superintendent of Schools and the School Board staff relative to financial records and reports given to him at principal's meetings, specifically, meetings on Friday, August 22, 1969 and Wednesday, September 30, 1970 and instructions given to him individually.

COUNT 2: Sammy Davis, Jr., while principal of the Ferriday 7th Grade School, and for the school year beginning September, 1970, was guilty of wilful neglect of duty and incompetence by violating his duties with respect to keeping accurate financial records applicable to the public funds administered by him, in addition to the deficiencies shown in the audit of Clayton Starling referred to above, by doing or failing to do the following:

1. Receipts were not properly accounted for.

2. Deposits were not made regularly.

3. There was not adequate control over the vending machine operation which resulted in about a 76% loss in profits. The profit that should have been

made is substantiated in part by the Dunn Candy Company.

4. No definite procedure in handling receipts, inventory or deposits in the vending machine operation. No certain time to take money from the vending machine, no certain person or time to count and deposit money. Deposits made at odd times for even amounts.

5. Checks were written from other than the regular check book, with some checks not supported by invoices.

6. Old invoices were allowed to accumulate without payment even when funds had been provided for this purpose by the school board office.

7. Receipts were rarely issued for cash income. Some receipts were not traceable to cash book and deposit slips.

8. The lunch fund was allowed to build up a balance throughout the school year indicating neglect in checking paid lunches against collected.

9. The lunch funds were not handled in a manner to safeguard against co-mingling of funds,

in violation of his responsibilities and duties as set out in Paragraph O. of the Concordia Parish Handbook, Page 49, Bulletin #741, Handbook for School Administrators, State Department of Education of Louisiana, Resolutions of Concordia Parish School Board dated July 3, 1969 and August 17, 1970 and verbal instructions from the Superintendent of Schools and the School Board staff relative to financial records and reports given to him at principal's meetings, specifically, meetings on Friday, August 22, 1969 and Wednesday, September 30, 1970 and instructions given to him individually.

COUNT 8: Sammy Davis, Jr., while Principal of the Ferri-

day 7th Grade School was guilty of wilful neglect of duty and incompetence in the connection with the purchase by him of a Cassette tape recorder from Wisdom's Tire and Service Company on February 12, 1971 and specifically his failure to justify the purchase of this equipment for school purposes and uses, his failure to produce and account for it at his school when requested to do so, his giving of false information to Verne Richey of the School Board staff on May 17, 1971 as to its location and use, and his failure to report the unpaid invoice for the recorder on March 12, 1971 during the audit of Clayton Starling, who specifically requested that he be furnished all unpaid invoices, and his failure to pay for this equipment until 24 June, 1971, although he was specifically requested on May 17 to immediately settle the matter with Wisdom's, all of which caused embarrassment to and had detrimental effects upon the public school system of Concordia Parish at a time when public confidence was of particularly need, all in violation of his responsibilities and duties as set out in Paragraph O. Concordia Parish Handbook, pages 20 and 49, Bulletin #741, Handbook for School Administrators, State Dept. of Education of Louisiana, Resolutions of Concordia Parish School Board dated July 3, 1969 and August 17, 1970 and verbal instructions from the Superintendent of Schools and the School Board staff relative to financial records and reports given to him at Principal's Meetings, specifically, meetings on Friday, August 22, 1969 and Wednesday, September 30, 1970 and instructions given to him individually.

COUNT 4: Sammy Davis, Jr., while Principal of the Ferriday 7th Grade School was guilty of wilful neglect of duty, incompetency, and dishonesty in connection with the use by him of the telephone number assigned to his school by reason of the fact that he did on numerous occasions, make long distance telephone calls for his own personal benefit, and use, and not for school business, and charge them to his school so that to cause the telephone company to bill the Concordia Parish School Board therefor, and the Concordia Parish School Board to pay therefor, and thereafter, pursuant to the policy of the School Board, reimbursal was made by the funds of

the Ferriday 7th Grade School by check signed by Sammy Davis, Jr., all of which is shown with in more particularity on the telephone company list of calls and copies of checks which are annexed hereto and made a part hereof, all in violation of his responsibilities and duties as set out in Paragraph O. Concordia Parish Handbook pages 20 and 49, Bulletin #741, Handbook for School Administrators, State Dept. of Education of Louisiana, Resolutions of Concordia Parish School Board dated July 3, 1969 and August 17, 1970 and verbal instructions from the Superintendent of Schools and the School Board staff relative to financial records and reports given to him at Principal's Meetings, specifically, meetings on Friday, August 22, 1969 and Wednesday, September 30, 1970 and instructions given to him individually.

/s/ Ben L. Green, Jr.
Ben L. Green, Jr., Superintendent
Concordia Parish School Board

CONCORDIA PARISH SCHOOL BOARD
Ben L. Green, Jr., Superintendent
Vidalia, Louisiana 71373

R.S. 17:443. Removal of teachers; procedure; right to appeal

A permanent teacher shall not be removed from office except upon written and signed charges of wilful neglect of duty, or incompetency or dishonesty, or of being a member of or of contributing to any group, organization, movement or corporation that is by law or injunction prohibited from operating in the state of Louisiana, or of advocating or in any manner performing any act toward bringing about integration of the races within the public school system or any public institution of higher learning of the state of Louisiana, and then only if found guilty after a hearing by the school board of the parish or city, as the case may be, which hearing may be private or public, at the option of the teacher. At least fifteen days in advance of the date of the hearing, the school board shall furnish the teacher with a copy of the written

charges. The teacher shall have the right to appear before the board with witnesses in his behalf and with counsel of his selection, all of which shall be heard by the board at the said hearing. Nothing herein contained shall impair the right of appeal to a court of competent jurisdiction.

If a permanent teacher is found guilty by a school board, after due and legal hearing as provided herein, on charges of wilful neglect of duty, or of incompetency, or dishonesty, or of being a member of or of contributing to any group, organization, movement or corporation that is by law or injunction prohibited from operating in the state of Louisiana, or of advocating or in any manner performing any act toward bringing about integration of the races within the public school system of the state of Louisiana, and ordered removed from office, or disciplined by the board, the teacher may, not more than one year from the date of the said finding, petition a court of competent jurisdiction for a full hearing to review the action of the school board, and the court shall have jurisdiction to affirm or reverse the action of the school board in the matter. If the finding of the school board is reversed by the court and the teacher is ordered reinstated and restored to duty, the teacher shall be entitled to full pay for any loss of time or salary he or she may have sustained by reason of the action of the said school board. As amended Acts 1956, No. 249, Section 1.

(Source: Acts 1922, No. 100, Section 48; Acts 1936, No. 58, Section 1; Acts 1944, No. 250, Section 1; Acts 1946, No. 297, Section 1, pars. 4, 5.)

CONCORDIA PARISH SCHOOL BOARD
Ben L. Green, Jr., Superintendent
Vidalia, Louisiana 71373

August 10, 1971

I acknowledge receipt from Superintendent Ben L. Green, Jr. the following:

(1) A copy of charges filed on Sammy Davis, Jr.

(2) A copy of the Tenure law from the Revised Statutes.

(3) A letter notifying me of charges filed by Superintendent Green.

/s/ Sammy Davis, Jr.
Date: 9-11-71
10:00 AM.

The above materials were delivered to Sammy Davis, Jr. at his home.

/s/ Ben L. Green, Jr.

Witness: /s/ W. L. Stampley

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION
NO. 11,577

IRMA J. SMITH, ET AL.

versus

CONCORDIA PARISH SCHOOL BOARD, ET AL.
UNITED STATES OF AMERICA,
Intervenor.

FOR PLAINTIFFS	MESSRS. Stanley A. Halpin, Jr. 606 Common Street New Orleans, Louisiana 70130
FOR DEFENDANTS	William C. Falkenheiner District Attorney Seventh Judicial District Vidalia, Louisiana 71373
FOR THE GOVERNMENT	Honorable John N. Mitchell Attorney General of the United States United States Department of Justice Washington, D. C. 20530

Donald E. Walter
United States Attorney
Western District of Louisiana
Post Office Box 33
Shreveport, Louisiana 71161

BEN C. DAWKINS, JR., CHIEF JUDGE

RULING

The Court carefully has considered the motion made for a preliminary injunction and temporary restraining order filed herein in behalf of Sammy Davis, Jr., Cleveland Watts, Eddie Coleman, Clarence Hymon, and Odeal Montgomery, which was presented to it during the late afternoon of August 16th, 1971.

Upon its receipt, we immediately contacted Honorable W. C. Falkenheiner, District Attorney for Concordia, and counsel for its School Board; and today have received a letter from Mr. Falkenheiner, enclosing a mass of data regarding these teachers, his letter and the original documents being attached hereto.

It appears that some of these teachers, pursuant to the Louisiana Teacher Tenure Law, LSA-R.S. 17:441, *et seq.*, have had charges filed against them by the Superintendent of Schools, Ben L. Green, Jr., which clearly are not in the slightest manner connected with desegregation orders heretofore entered in this case, nor are they racially motivated, but, on the contrary, are purely for disciplinary or other apparently valid reasons concerning their conduct as teachers in the School System. Mr. Falkenheiner's letter, and its attachments, speak for themselves and there is no need for this Court to elaborate upon them.

Obviously, the procedure being followed is in strict ac-

cordance with LSA-R.S. 17:443, a photocopy thereof being attached hereto (only the portion marked by this Court in brackets being clearly unconstitutional). It even appears that there is one non-tenured white teacher recommended not to be re-employed by her black principal, but who is to be afforded a hearing as if she did possess such tenure. Another non-tenured teacher, Joyce Smith, likewise is being afforded a hearing, as provided in § 443.

Considering all of the circumstances disclosed by Mr. Falkenheiner's letter and its attachments which show: That desegregation or racial motives are in no way involved in connection with the action proposed to be taken with respect to the persons mentioned in the motion, or the others not mentioned therein; that they simply are charged for apparent good cause with misconduct or incompetence in performing their duties; that they are entitled to a full, fair hearing before the School Board (either openly or in closed session, according to their own choice) and will be granted such, with provision for counsel to be present to represent them; and that, if the Board's decision is adverse to any of them, they have a full, complete, and adequate remedy in the State Courts of Louisiana, as shown in the statute mentioned, this Court should not and will not interfere with the orderly internal administrative processes of the School Board, which is entitled properly to manage its affairs in accordance with State law.

If we were to grant the relief prayed for in this motion, in every instance, in all school systems, not only in this District but nation-wide, where disciplinary or other action is necessitated by a teacher's conduct or by other valid circumstances such as are described in Mr. Falkenheiner's letter, this Court (and all United States District Courts where desegregation orders have been entered) literally would be flooded with similar motions, and attendant probably protracted hearings, exacerbating already overcrowded dockets, and making it virtually impossible for such Courts to perform their duties in matters in which federal law requires action

by them. Obviously, neither the Supreme Court, nor Congress in adopting the Civil Rights Act of 1964, ever contemplated or intended such a result.

Moreover, although of no particular moment, since curative action could be taken by movants' counsel, it is noted that he totally has failed to comply with the mandatory requirement of Rule 65(b)(2), F.R.Civ., P., in that he has failed to certify ". . . to the court in writing the efforts, if any, which have been made to give the notice and reasons supporting his claim that notice should not be required."

For all of these reasons, we must decline to sign the proposed Temporary Restraining Order attached to the Motion; and relegate movants to the administrative and judicial procedures available to them under State law.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, this 18th day of August, 1971.

/s/ Ben C. Dawkins, Jr.
CHIEF JUDGE

Office of
THE DISTRICT ATTORNEY
Seventh Judicial District
Concordia and Catahoula Parishes

August 16, 1971

Honorable Ben C. Dawkins, Jr.
District Judge
U. S. District Court
U. S. Post Office Bldg.
Shreveport, Louisiana

Re: Irma J. Smith, et al.,
United States of America,
vs.
Concordia Parish School Board,
et al.,
Civil Action No. 11,577

Dear Judge Dawkins:

After your telephone call of today, I have contacted Mr. Calhoun, President and Mr. Green, Superintendent; of the School Board.

The only action taken by the School Board is shown on the attached copy of the minutes of a school board meeting on the 5th day of August, 1971. The individuals covered by that resolution are the cases which I mentioned in your office with Mr. Halpin and in my Motion for Supplemental Relief of June 3, and a resume of each case is as follows:

(1) Sammy Davis, Jr., a tenured black principal against whom charges of willful neglect of duty and incompetence (3 counts) and willful neglect of duty, incompetence and dishonesty (1 count) have been filed. A copy of the charges is enclosed. A hearing under the Louisiana Tenure Law is scheduled for August 27, as shown by the letter annexed.

(2) Cleveland Watts, a tenured black teacher under a 3 year "C" certificate which has expired. Mr. Watts is a resident of the State of Mississippi and is no longer the holder of a valid Louisiana teachers certificate. He is also charged with willful neglect and incompetence by his supervisors, including a black principal. A hearing is schedeuled for September 2, 1971 under the Louisiana Tenure Law as shown by the attached letter.

(3) Bessie Luckett, a black tenured teacher against whom charges of willful neglect of duty and incompetence have been preferred by her black principal and as shown by the copy of notice enclosed, her hearing is scheduled for 2 September, 1971.

(4) Gene Fleming, is a white temporary, probationary teacher whose reemployment was not recommended by her black principal. A hearing is scheduled under the Louisiana Tenure Law for 27 August, 1971 as shown by the letter attached. In this case and the one following we are following the same procedure as to notice and hearing as in the cases of tenured teachers although the Tenure Act does not require that we go this far for the temporary people.

(5) Joyce Smith, a black temporary, probationary teacher who is single and became pregnant and whose reemployment was not recommended by her white principal and as shown by the copy of the notice enclosed, her hearing is scheduled for 27 August, 1971.

You mentioned to me on the phone only the cases of Davis and Watts as being of some objection to the plaintiffs. I assume that they do not object to the action taken in the other three cases. However, you gave me three other names being those of Eddie Coleman, Clarence Hymon and Odeal Montgomery.

Mr. Calhoun advises me that there definitely has been

no action by the school board on these people, but that a special meeting is scheduled for tomorrow (Tuesday, Aug. 17) at which the board will discuss the problems presented to it caused by a reduction in the amount of funds being received under one of the Federal grants (I believe that he told me Title I). These three last named persons were being paid under this grant and they have been furnished notices by Mr. Green of the cut-off of the these funds. The Board may have to make up the loss of these funds out of its own funds, if available, or it may decide to discontinue this program and find some other positions for these persons. In addition to Coleman, Hymon and Montgomery, all of whom are black, the same problem exists with respect to Edgar Gibson who is white. Nevertheless, the board at this time has taken no action against these persons and as I understand it, does not plan to demote them but may have to change their assignments because of the cut-off in the Federal funding of the program under which they operate.

It is regrettable, of course, that the board has to take disciplinary action against the five teachers first mentioned, but these problems always arise in dealing with personnel and the board cannot assume the responsibility for maintaining these persons in the responsible positions which they hold if they are in fact guilty under the law of serious charges. The Board should be allowed to continue with these hearings which are being held with proper notice and protection of the defendants rights, subject of course to judicial review of the results.

I appreciate the opportunity of furnishing this information to you.

With very best wishes.

Very truly yours,
/s/ W. C. Falkenheiner
W. C. FALKENHEINER
District Attorney

WCF:sal

APPENDIX I

We urge this Court to make seniority the standard governing layoffs and demotions caused by reductions in force because it is consistent with *Singleton*, fair to the educators, and easily administered by the school district. The seniority standard is objective and non-discriminatory. Furthermore, it is widely used in the field of education to determine which teachers must bear the burden of a reduction in force.[6] Perhaps the greatest advantages inherin the seniority standard are that by eliminating the exercise of discretion, the standard insures against discrimination and is easy applied. Ordinarily there will be no disputed issues of fact that might require a hearing. The school board may act with dispatch under this standard and the educator may feel that he is being dealt with fairly.

C. Standards for Dismissal, Demotion and Non-Renewal Cause.

We come now to the most difficult task before the Court —the formulation of objective criteria governing terminations and demotions for cause. We have no **"objective" criteria to offer to the Court; and as far as we know, there are none in being that comport with sound educational theory.**

Objective standards can be employed easily and fairly to execute a reduction in force, for there the administrator's object is to reduce certain positions on the faculty, not to eliminate certain faculty members. **Dismissals for cause, however involve decisions on the merits of an individual's perfor-**

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6. At least eight states have statutes making seniority the standards for laying off and recalling teachers. Hawaii Revised Statutes § 297-11; Kansas Statutes Annotated § 72-5406; Kentucky Revised Statutes § 161.800; Vernon's Annotated Missouri Statutes, § 168.221; Minnesota Statutes Annotated, Education Code, § 125.17 Subd. 11; 33 Ohio Revised Code Annotated, § 3319.17; New Jersey Statutes Annotated, Education § 18A-28-9 to 28-12; Laws of Rhode Island, § 16-13-6. One state statute fixes seniority as the standard for layoffs, Cal. Education Code § 13-447; and two other state statutes fix seniority as the standard for recall after a layoff, Arizona Revised Statutes, § 15-257; West Virginia Code Annotated § 19 A-2-2.

mance on the job. And, at least in our view, teaching is an art which cannot be evaluated quantitatively.

Accordingly, we do not propose objective criteria governing terminations and demotions for cause. Instead, we have proposed a procedure for adopting and applying criteria. We assume that at least some of the criteria adopted under our procedures would be subjective, and that decisions made pursuant to such criteria necessarily would be judgmental. We have tried, however, to objectivize the decisional process by requiring that the criteria be weighted and that the teacher's evaluation contain a written statement of reasons supporting the evaluation. Such procedural requirements make dismissals, non-renewals and demotions reviewable by the teachers, the administrators and the courts, if need be.

The standards and procedures we propose for terminations and demotions for cause are keyed to Louisiana's tenure laws. Under those laws permanent teachers—those teachers having completed satisfactorily three years of service—may only be dismissed for "willful neglect of duty, or incompetency or dishonesty . . ." R.S. 17:443. The remaining class of teachers — probationary teachers — may be dismissed "upon the written recommendation of the parish or city superintendent of schools, as the case may be, accompanied by valid reasons therefor." R.S. 17:442.

In accordance with Louisiana law we propose that the grounds for dismissing permanent teachers be limited to incompetency, willful neglect of duty and dishonesty. The grounds for dismissing probationary teachers would be the same, except that the school district is afforded more freedom to dismiss probationary teachers on the merits of their performance. Accordingly, we suggest that probationary teachers be judged on the standard of willful neglect of duty, dishonesty and "inadequate teaching performance." The latter standard is intended to be more permissive than the "incompetence" standard governing dismissals of tenured teachers.

The procedures laid out in Part C, *supra*, are intended to

cover all terminations and demotions that are not incident to a reduction in force. Thus, they will govern the renewal or non-renewal of annual contracts as well as mid-year firings. As we understand Louisiana law, non-renewals are encompassed within the statutory provisions relating to the dismissal of permanent and probationary teachers.[7]

1. **Willful Neglect and Dishonesty.**

In our view there is little value in trying to define or codify the circumstances under which a teacher might be dismissed or non-renewed for willful neglect of duty or dishonesty and, without doubt, must be made on a case-by-case basis.

Under Louisiana law, permanent teachers are entitled to a hearing before they are removed for willful neglect of duty or dishonesty, R.S. 17:443. We have carried that requirement forward into our proposed criteria. In addition, Part C requires that probationary teachers be granted a hearing prior to dismissal for willful neglect of duty or dishonesty. As we have said, "dishonesty" and "willful neglect" determinations require a firm grasp of the facts. **Hearing procedures provide the best assurance we have that there will be a full development of the facts prior to decision.**[8] This common sense aspect of the proposed procedures is reinforced by constitutional mandate. Dismissals for "willful neglect" or "dishonesty" stain the reputation of the educator and materially reduce, if not foreclose, his opportunity to practice his profession elsewhere. Last term, the Supreme Court held that "[W]here a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him, notice

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7. R.S. 17:442 provides "any teacher found unsatisfactory by the parish or city school board . . . at the expiration of the said probationary term, shall be notified in writing by the board that he has been discharged or dismissed. . . ."

8. In *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970), the Court said: "[I]n almost every setting where important decision turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."

and an opportunity to be heard are substantial." *Wisconsin v. Constantineau*, ____ U.S. ____ (1971); *Birnbaum v. Trussel*, 371 F.2d 672 (2d Cir., 1966); *Meredith v. Allen County War Mem. Hospital Comm'n.*, 397 F.2d 33 (6th Cir., 1968).

2. **Incompetency and Inadequate Teaching Performance.**

The other permissible grounds for dismissal, non-renewal or demotion are "incompetency" for tenured teachers and "inadequate teaching performance" for probationary teachers. Dismissals for incompetency or inadequate teaching performance strike at the heart of teacher evaluation problems. To deal with the problems, we propose the inauguration of a system-wide program of evaluation for all faculty members, the faculty evaluations being made on the basis of published, non-discriminatory criteria.

In order to assure that these criteria are non-racial and suitable for the local school district, we suggest that a bi-racial faculty-administration Committee on Standards be created. This Committee should be comprised of six persons—two white faculty members appointed by the community's bi-racial committee established; two black faculty members also appointed by the bi-racial committee; and one white and one black faculty member appointed by the School Board. This Committee would be charged with the responsibility of developing non-discriminatory standards for faculty evaluation. The Committee would also be required to weight the standards or criteria it developed.[9]

The criteria developed by the Committee and the weights assigned to each criteria are to be filed with this Court on or before October 15, 1971, and thereafter on _____ _____, adopted as proposed or as revised by the Court. Once adopted by the Court, the evaluation criteria should be published.

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9. The Committee on Standards is also charged with the responsibility of weighting the standards to be used in hiring and promotion.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

IRMA J. SMITH, et al., Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. CONCORDIA PARISH SCHOOL BOARD, et al., Defendants.	CIVIL ACTION NO. 11577

MEMORANDUM OF THE UNITED STATES

I. Introduction

By order of the United States Court of Appeals for the Fifth Circuit dated June 15, 1971, and the order of this Court dated July 6, 1971, the plaintiffs, defendant school board and the United States were required to submit non-discriminatory, non-racial objective criteria to cover both faculty reduction and dismissals for cause. On August 30, 1971, plaintiffs filed a Memorandum with recommendations for (1) standards for hiring and promotion; (2) standards for lay-offs and demotions necessitated by a reduction in force; and (3) dismissals, non-renewals and demotions for cause. On the same date, defendants filed a Response to Order Requiring Production of Objective Criteria which included standards for (1) faculty reduction or demotions necessitated by conversion to a unitary system, and (2) dismissals for cause. By letter of August 31, 1971 to the Court, the United States submitted sug-

gested objective, non-racial faculty evalution criteria for determining dismissals and demotions incident to a reduction in force. At the same time, the Court granted our requested extension of time for submission of criteria for determining dismissals for cause.

This Memorandum is submitted to the Court for the purpose of commenting on the proposals of plaintiffs and defendants, with respect to criteria for dismissals and demotions for cause, and making our own recommendations concerning this matter.

II. Proposals of Plaintiffs and Defendants

The proposals of both plaintiffs and defendants concerning demotions and dismissals of teachers for cause would require, at the minimum, application of the Louisiana Teacher Tenure Act, L.R.S. § 17:443. While this statute is applicable only to tenured teachers, both parties have recommended its application to non-tenured (or probationary) teachers as well. This act specifies three grounds for which a teacher may be demoted or dismissed: incompetency, wilful neglect of duty, and dishonesty. A teacher whose dismissal or demotion is sought has a right to a hearing before the school board. At least fifteen days in advance of the hearing, the teacher must receive a written copy of the charges brought against him, presented in such specificity as to allow him (or her) to prepare a defense. At the hearing the teacher has the right to appear before the board with counsel and with witnesses in his behalf, and he may appeal the board's decision to a court of competent jurisdiction.

Plaintiffs and defendants have agreed that application of this procedure would be appropriate for dismissals or demotions for cause involving charges of wilful neglect of duty or dishonesty. Disagreement between the parties arises over the procedure to be followed when dismissal or demotion is sought on grounds of incompetency. Defendants again would require application of the procedures of L.R.S. 17:443 for both ten-

ured and non-tenured teachers. Plaintiffs have proposed additional procedural steps designed to guarantee non-discriminatory application of the teacher tenure law and to objectivize, to the degree possible, criteria to be applied in dismissals or demotions for incompetency.[1] Under this proposal a bi-racial team of six teachers (two whites and two blacks to be selected by the biracial committee, and one white and one black to be selected by the school board) would be charged with responsibility for developing non-discriminatory standards for faculty evaluation, and assign weighted scores to such standards. Thereafter, a bi-racial team (one white and one black) of teachers would evaluate bi-annually the competency of each teacher and principal in the school district based on these standards. The report of the evaluation team would serve as the sole basis for removal of teachers or principals for incompetency. No teacher could be dismissed for incompetency if his evaluation report placed him higher in competence than another teacher who was not being dismissed on the same ground.

III. Discussion

Inasmuch as the only major point of disagreement between plaintiffs and defendants concerns dismissals for cause on the grounds of incompetency, we will limit our discussion to this aspect of the proposals.[2] The difficulty of establishing objective criteria to govern demotions and dismissals for cause has been alluded to by plaintiffs. (See plaintiff's Memorandum,

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1. Plaintiffs also propose a standard of "inadequate teaching performance" for non-tenured teachers. This standard is intended to be more permissive than the incompetency standard for tenured teachers. Inasmuch as defendants have agreed to apply the same procedures for non-tenured teachers as for tenured teachers, it may be unnecessary to create this additional standard.

2. We note that defendants also made the following statement in their proposal for dismissals for cause:
   > There will be cases when a teacher or an employee is hired on a temporary basis for an ad hoc type of situation. In such cases the employment will simply expire upon termination of the particular situation involved and there will be no need to apply this criteria.

   We believe that a fuller explanation clarifying the meaning of this paragraph should be required of defendants before allowing such an exception to the tenure law.

pp. 1, 2, 11.) In attempting to objectivize a standard of incompetency, the same considerations are applicable. The following attempt to define incompetency by one Louisiana state court indicates the inherently subjective nature of this standard:

> Incompetency is a relative term which may be employed as meaning disqualification, inability or incapacity. It can refer to lack of legal qualification or fitness to discharge the required duty. It may be employed to show want of physical, intellectual or moral fitness. *Tichenor v. Orleans Parish School Board*, 144 So.2d 603 (quoting from *County Board of Education of Clark County, Ala. v. Oliver*, 270 Ala. 107, 116 So.2d 566)

In view of this difficulty, we, like the plaintiffs, believe that the goal of non-discriminatory demotions and dismissals for cause envisioned by the Court of Appeals and this Court can best be achieved through the framework of the Teacher Tenure Law, with additional procedural safeguards to protect all teachers from possible discriminatory application of these statutes. While the procedural apparatus recommended by plaintiffs is aimed at providing safeguards against such possible discriminatory application, we think it has two shortcomings:

(1) Plaintiffs candidly state that in their view, "teaching is an art which cannot be evaluated quantitatively." (p. 11) Yet, their proposal would require a bi-racial "committee of standards" to assign weighted scores to subjective criteria. In essence, their proposal requires the local teachers to attempt to perform the task assigned by the Court to the parties to this case.

(2) The task of evaluating each teacher in the school system twice a year may prove more burdensome and time-consuming than necessary to protect all teachers against discriminatory dismissal or demotion on the grounds of incompetency.

In order to meet these shortcomings, we would recom-

mend the following procedure to assure non-discriminatory application of the tenure law. A bi-racial review board, composed of an equal number of black and white teachers in the school system, would be created[3] to investigate each dismissal or demotion on grounds of incompetency prior to any hearing before the school board. As soon as a principal recommends to the superintendent that a faculty or staff member be removed on these grounds, the superintendent would direct the review board to study the charges, interview the parties involved as well as other faculty or students as the review board deemed appropriate, and submit a report to the school board in written form with a review of the facts and the unanimous or separate recommendations of the review board in each case. The bi-racial review board should be specifically instructed to concentrate its investigation and report on any evidence or allegations of racial discrimination as a basis for the dismissal or demotion. When such **evidence** or **allegations** exist, the review board should compare the dismissed faculty or staff member's competence with that of other faculty or staff members who hold similar positions.[4] Following any action by the school board, either with or without a hearing, defendants shall be required to prepare a written report of the action taken on the dismissal or demotion, including with said report a copy of the recommendation(s) and report(s) of the bi-racial review board. This report shall be kept on file by the defendants and shall be open to inspection by parties to this case and the teacher affected by any action taken by the board.[5]

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3. This committee might be chosen in the manner recommended by plaintiffs for their committee. Alternatively, it might be feasible to select this committee by allowing all faculty and staff in the system to elect a review board.

4. These judgments will, by their nature, be somewhat subjective. However, requiring a comparative analysis of teachers by a bi-racial committee of their peers should provide the necessary procedural safeguards.

5. Quite clearly, should a teacher still feel that his or her dismissal or demotion was a result of racial discrimination, legal action could be initiated in state court, L.R.S. 17:443, or federal court. See *Moses v. Washington Parish School Board*, 304 F. Supp. 1112 (E.D. La. 1969); *Cornist v. Richland Parish School Board*, —— F.2d. ——, No. 71-2148 (5th Cir., Sept. 17, 1971).

In order to keep the Court and the parties apprised of all dismissals and demotions, we believe the reporting provision presently required under the Fifth Circuit order of June 15, 1971 and this Court's order of June 17, 1971 should be amended to require the defendants to report (1) the name and race of all faculty members dismissed or demoted for cause and the grounds therefor, the date of such action, and the date of any hearing before the school board; (2) the name and race of each faculty member dismissed or demoted as a result of a reduction in force.

Respectfully submitted,

DAVID L. NORMAN
Assistant Attorney General

s/ Brian K. Landsberg
BRIAN K. LANDSBERG
EDWARD S. CHRISTENBURY
JOSEPH D. RICH
Attorneys
Department of Justice
Washington, D. C. 20530

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the foregoing Memorandum of the United States upon all parties by mailing copies thereof by United States mail, postage prepaid, to the following counsel of record:

W. C. Falkenheimer, Esq.
P. O. Box 308
Vidalia, Louisiana 71373

Stanley A. Halpin, Jr., Esq.
606 Common Street—Suite 304
New Orleans, Louisiana 70130

This 30th day of September, 1971.

s/ Joseph D. Rich
JOSEPH D. RICH
Attorney
Department of Justice

APPENDIX K

LOUISIANA TEACHER TENURE LAW

R.S. 17:441. Definitions

As used in this Sub-part, the word "teacher" means any employee of any parish or city school board who holds a teacher's certificate and whose legal employment requires such teacher's certificate.

R.S. 17:442. Probation and tenure of parish or city school teachers

Each teacher shall serve a probationary term of three years to be reckoned from the date of his first appointment in the parish or city in which the teacher is serving his probation. During the probationary term the parish or city school board, as the case may be, may dismiss or discharge any probationary teacher upon the written recommendation of the parish or city superintendent of schools, as the case may be, accomplished by valid reasons therefor. . . .

R.S. 17:443. Removal of teachers; procedure; right to appeal

A. A permanent teacher shall not be removed from office except upon written and signed charges of wilful neglect of duty, or incompetency or dishonesty, or of being a member of or of contributing to any group, organization, movement or corporation that is by law or injunction prohibited from operating in the State of Louisiana, and then only if found guilty after a hearing by the school board of the parish or city, as the case may be, which hearing may be private or public, at the option of the teacher. At least fifteen days in advance of the date of the hearing, the school board shall furnish the teacher with a copy of the written charges. The teacher shall have the right to appear before the board with witnesses in his behalf and with counsel of his selection, all of whom shall be heard by the board at the said hearing.

Nothing herein contained shall impair the right of appeal to a court of competent jurisdiction. . . .

R.S. 17:444. Promotions; probationary periods and tenure

Whenever a teacher who has acquired permanent status, as set forth in R.S. 17:442 and 17:443, in a parish or city school system is promoted by the employing school board by moving such teacher from a position of lower salary to one of higher salary, such teacher shall serve a probationary period of three years in the higher position before acquiring permanent status therein, but shall retain the permanent status acquired in the lower position from which he or she was promoted.

During the probationary period in the position to which promoted a teacher shall not be disciplined, removed or demoted to the lower position from which he or she was promoted except in compliance with the provisions of R.S. 17:442. At the expiration of the probationary period in the higher position, a teacher, unless removed or demoted in accordance with R.S. 17:442, shall automatically acquire permanent status in the higher position and thereafter may not be disciplined, removed or demoted from such higher position except in compliance with the provisions of R.S. 17:443.

Where a teacher has not completed the probationary period for teachers as required by R.S. 17:442, or for a particular promotional position as established herein, and is promoted to a higher position, the probationary period, either as a teacher or in the previous promotional position, shall continue to run and at the end of such three year probationary period the teacher shall automatically acquire permanent status in the previously held position until permanent status in the new position is acquired by compliance with the provisions of this Section.

Amended by Acts 1968, No. 494, § 1.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-2065

CONCORDIA PARISH SCHOOL BOARD,

Petitioner,

versus

SAMMY DAVIS, JR.,

Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

STANLEY A. HALPIN, JR.
344 Camp Street
Suite 1212
New Orleans, Louisiana
70130

Attorney at Law

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-2065

CONCORDIA PARISH SCHOOL BOARD,

Petitioner,

V.

SAMMY DAVIS, JR.,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent prays that this Court deny the petition for writ of certiorari sought by petitioner to review the decision of the United States Court of Appeals for the Fifth Circuit rendered April 24, 1974, affirming

the judgment of the United States District Court for the Western District of Louisiana issued September 1, 1972.

QUESTIONS PRESENTED

I.

Whether the Court of Appeals clearly erred in upholding the District Court's reinstatement will full rights of a black educator who had been dismissed by petitioner Board without the development, promulgation and application of non-racial objective criteria, although the Board had repeatedly been ordered to develop such criteria by both the Court of Appeals and the District Court in the following decisions: Smith v. Concordia Parish School Board, consolidated sub nom Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir., 1969), rev'd. on other grounds, Carter v. West Feliciana School Board, 396 U.S. 290 (1970); Smith v. Concordia Parish School Board, U.S.D.C., W.D. La., C.A. No. 11,577, Order of September 3, 1970 (unreported, appears as Appendix A attached hereto); Smith v. Concordia Parish School Board, 445 F.2d 285 (5th Cir., 1971) (attached as Appendix B hereto).

II.

Whether the Court of Appeals' decision requiring this local elected School Board, which has the power to sue and be sued, and the power to levy and collect taxes, is barred by the Eleventh Amendment to the

United States Constitution as interpreted by this Court in Edelman v. Jordan, __U.S.__, 39 La.Ed.2d 662, 94 S.Ct. 1347 (1974).

STATEMENT OF THE CASE

The instant case is but another incident of this recalcitrant School Board resisting or attempting to circumvent explicit orders of the federal courts to desegregate and end racial discrimination in its schools. The long record in this case indicates that this Board had to be explicitly ordered to take each step along the desegregation process, and that in many instances, even after an explicit mandate was handed down, further litigation was necessary to bring the Board into compliance.

This school desegregation suit was originally filed in November, 1965. Operating under various forms of freedom-of-choice, the school system remained racially segregated. Hall v. St. Helena Parish School Board, 417 F.2d 801 (5th Cir., 1969). In August, 1969, on remand from Hall, the District Court approved a School Board-proposed desegregation plan which called for the gradual conversion to a unitary system over a three-year period. The plaintiffs appealed, and the Fifth Circuit reversed the District Court's Order in part, and directed the conversion to a unitary system by the beginning of the 1970-71 school year, and additionally required that this School Board develop non-racial objective criteria governing its employment practices to assure proper desegregation of its faculty

and staff. Singleton v. Jackson Municipal Separate School District (5th Cir., 1970), 419 F.2d 1211. Plaintiffs appealed to this Court, and this Court required conversion to a unitary system by February 1, 1970. Sub nom Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1970).

On remand the District Court ordered the dismantling of the dual school system by February 1, allowing sex separation until a hearing to be conducted prior to the 1970-71 school term, and incorporated in its Order the ruling of the Fifth Circuit in Singleton, supra, relative to non-racial objective criteria. Smith v. Concordia Parish School Board, U.S.D.C., W.D. La., C.A. No. 11,577, Order of January 30, 1970.

Prior to the start of the 1970-71 school term, the Board dismissed and demoted twenty black educators and hired twenty-five white educators to replace them, without hiring a single black. Among the twenty black educators dismissed were Mr. Sammy Davis, Jr., whose second dismissal is the subject of this petition for certiorari, and Mr. Barney Schoby, a tenured black teacher who had been afforded a sham hearing, purportedly pursuant to the Louisiana Teacher Tenure Law before dismissal.[1] On a Motion for Supplemental

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[1]At this time Mr. Schoby was President of the predominantly black Concordia Education Association, an affiliate of the predominantly black Louisiana Education Association,

Relief filed by the plaintiffs, the District Court held that the dismissals and demotions, including those of tenured teacher Schoby and principal Sammy Davis, Jr., had been effected without the establishment of objective criteria as required by its January 30, 1970 Order, and ordered their reinstatement. Smith v. Concordia Parish School Board (U.S.D.C., W.D. La., C.A. No. 11,577, Order of September 3, 1970) (attached as Appendix A). On appeal the Fifth Circuit affirmed the reinstatement of the black teachers, as well as approved the use of ratios as a method of preventing racial discrimination against black teachers pending the development of objective criteria. Smith v. Concordia Parish School Board, 445 F.2d 285 (5th Cir., June 15, 1971). The Court of Appeals further directed: "The District Court will require the Board, the plaintiffs, and the Department of Justice to submit, within fifteen days, non-discriminatory, non-racial objective criteria to cover both faculty reduction and dismissal for cause. If the

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which gained recognition as the Louisiana affiliate of the National Education Association when the all-white Louisiana Teachers Association refused to renounce segregation by merging with the LEA. At the time of the dismissal which is the subject of this case, Mr. Davis was President of the Concordia Education Association, and had been extremely active in the struggle of black teachers in Concordia Parish to receive fair treatment by the School Board.

parties cannot agree on such criteria, the District Court will, within thirty days thereafter, require the Board to adopt the criteria that the District Court prescribes so as to effectively comply with the provisions of Singleton." (Emphasis supplied). Without even having submitted to the District Court proposed objective criteria, the Board proceeded with its dismissal of Mr. Davis and filed their proposed criteria only after he had been dismissed on September 2, 1971.

The Board in its petition to this Court would lead the Court to believe that it had adopted and submitted to the Court valid objective criteria prior to Mr. Davis' dismissal. (Appendix D to petition for writ of certiorari). However, a full examination of the record, with which the Court of Appeals and the District Court were quite familiar, will indicate that the March, 1971 purported criteria were indistinguishable from those which the District Court in its September 3, 1970 Order, found to be far too vague to be considered objective. Further, this March, 1971 criteria never purported to be in compliance with the June 15, 1971 Order of the Fifth Circuit, which set forth the types of dismissals for which objective criteria were to be developed. The Board itself knew that it did not have nor did it apply objective criteria at the time of Mr. Davis' dismissal. The then attorney for the Board, District Attorney W.C. Falkenheiner, admitted at the District Court hearing herein that "at the time this hearing [Mr. Davis' hearing before the School Board] was held objective criteria

had nothing to do with that . . . and at the time of the hearing, we had no objective criteria." (5th Cir. App. p. 47, emphasis supplied); and at the District Court hearing on defendants' application for a stay, Mr. Falkenheiner again admitted that at the time dismissal proceedings were brought against Mr. Davis, that ". . . we were under orders of the Fifth Circuit to produce objective criteria and, of course, no inference by the Board here that it has any objective criteria. That is admitted, it had none". (5th Cir. App. p. 60). Further, although both sides had rested in the School Board hearing by Friday, August 30, 1971, the School Board deferred its decision on Mr. Davis' dismissal until Monday, September 2, 1971. On Monday, September 2, 1971, the same day that Mr. Davis was formally dismissed by the Board, the School Board filed with the District Court its proposed objective criteria in response to the June 15, 1971 Order of the Court of Appeals. This pleading is attached heretc as Appendix C. If the School Board believed that it already had objective criteria, it could have at least attempted to apply these criteria to Mr. Davis, or if it believed it had objective criteria, it would certainly have been unnecessary for the Board to file a new and different set of objective criteria on September 2, 1971.

The Board in its petition for writ of certiorari would also have this Court believe that respondent sat on his rights and did not assert them promptly in federal court. This is simply not the case. Prior to the School Board hearing, respondents moved for a

temporary restraining order and preliminary and permanent injunctions against the dismissal of Mr. Davis on grounds that the Board was not applying objective criteria and that the dismissal was racially discriminatory and retaliatory against Mr. Davis' civil rights activities. The District Court denied the temporary restraining order by ruling of August 20, 1971, which concluded "we must decline to sign the temporary restraining order attached to the motion; and relegate movants to the administrative and judicial procedure available to them under State law". 331 F.Supp. 330 (W.D. La., 1971). The District Court after denying the temporary restraining order did not set plaintiff-respondents' motions for preliminary and permanent injunctions for hearing, in spite of requests by plaintiffs' counsel, on grounds that the District Court's docket was overcrowded, and that the same issue was on appeal to the Fifth Circuit in two other teacher dismissal cases (Chisley v. Richland Parish School Board, 448 F.2d 1251, and Cornist v. Richland Parish School Board, 448 F.2d 594). Prior to the beginning of the 1972-73 school term, the District Court having still not set the remaining motions, plaintiffs on or about August 24, 1972 filed a second Motion for Supplemental Relief, together with motions for preliminary injunction, temporary restraining order, and summary judgment. A hearing was finally conducted on September 1, 1972, resulting in the decision affirmed by the Court of Appeals, and for which review is now sought.

After the time allowed by the Rules had expired, petitioner Board moved in the Court of Appeals for a rehearing, and to supplement the record on appeal, attaching to their motion the documents which they have attached as Appendices C through K of their petition for certiorari filed herein. The Court of Appeals, presumably viewing these documents and determining that they cast no new light on the case, denied petitioner School Board's motion to supplement the record. Petitioner has also sought stays in the Court of Appeals and in this Court, which have been denied. Accordingly, the District Court conducted a hearing on November 20, 1974, on the question of the exact determination of the dollar amount of the back pay award, as well as accepted briefs on the question of whether the Eleventh Amendment prohibited a back pay award. The petitioner School Board did not attempt to introduce any evidence on the question of the Eleventh Amendment at the November 20, 1974 hearing in the District Court. The District Court has taken the matter under advisement, calling for simultaneous briefs within twenty-one days of the hearing.

REASONS FOR DENYING THE WRIT

I. With Respect to the Rights of Dismissed Educators, the Decision Below is Consistent with Decisions of this Court, Other Decisions of the United States Court of Appeals for the Fifth Circuit, and Does Not Conflict with Decisions of Other Circuits.

The decision below does not conflict with

this Court's decisions in Board of Regents v. Roth, 1972, 408 U.S. 564, 92 S.Ct. 2701, 33 La.Ed.2d 548, nor Perry v. Sindermann, 1972, 408 U.S. 593, 92 S.Ct. 2694, 33 La.Ed.2d 570. Roth and Sindermann both involved the question of whether and under what circumstances a non-tenured teacher has a "property interest" in re-employment or is deprived of "liberty" so as to require a due process hearing before dismissal. This is simply not the issue in this case. Mr. Davis is a 40-year-old educator who holds a Master's Degree and hours toward a Doctorate. He has over fifteen years of experience in the Concordia system, and was first made a principal over five years ago when the Concordia School Board operated a totally segregated school system. He has been tenured for many years as both a teacher and a principal. The issue in this case is thus not whether under Roth and Sindermann, Mr. Davis was entitled to due process before being dismissed, but rather his dismissal was violative of the Fourteenth Amendment prohibition against racial discrimination and decisions thereunder.

The decision of the Court below does not conflict with other decisions of the Fifth Circuit in Lee v. Roanoke City Board of Education, __F.2d__ (5th Cir., 72-1656, June 28, 1972); Thompson v. Madison County Board of Education, 476 F.2d 676 (March 13, 1973), reaffirmed in Thompson v. Madison County Board of Education, __F.2d__ (No. 73-3509, 5th Cir., June 20, 1974); and Robinson v. Jefferson County Board of Education, __F.2d__ (No. 73-2134, 5th Cir., October 23, 1973).

Lee merely stated the obvious, that a board need not retain an incompetent teacher, but held that a tenured teacher must be reinstated when terminated without a hearing, and without the use of non-racial objective criteria. In Thompson, the Fifth Circuit set a standard for determining the types of dismissals which could be conducted without the application of objective criteria, carefully providing safeguards against black teachers being dismissed, allegedly "for cause", in circumvention of the Singleton ruling. Thompson thus excepted from the Singleton requirement "types of conduct that are repulsive to the minimum standard of decency". The instant case is not in conflict with Lee, nor Thompson, for in the instant case, the allegations of wrongdoing fall far short of the Thompson exclusion. The Board, however, contends here as they did in the Court of Appeals, that by labelling the charges "for cause", Mr. Davis' case is removed from Singleton's coverage, and that his dismissal, admittedly without objective criteria, was therefore valid. However, Counts One and Two charge only willful neglect of duty and incompetence relative to an alleged lack of adequate records of the Seventh Grade School candy fund. The petitioner Board's recitation of the background of these charges omits the fact that Mr. Davis himself repeatedly requested an audit and bookkeeping assistance relative to this fund, and that the school secretary, who ordinarily administers this fund, was not selected by Mr. Davis, but that three different secretaries were assigned to this job by the Board during Mr. Davis' principalship. (See 5th Cir. App. p. 92-93). Further, the auditor's findings

and recommendations (attached to Defendant's Answer in the District Court) merely recommended a "stricter accounting" and a procedure for collecting vending machine money. Accordingly, under the Thompson standard, it is clear that the conduct which Mr. Davis is alleged to have committed falls far short of that "repulsive to the minimum standards of decency -- such as honesty and integrity". The Court of Appeals was certainly aware of these facts indicated in the pleadings, and merely applied the Thompson standard to the instant case.

The Robinson case is simply not applicable in that apparently the parties in that case did not raise the Singleton issue. Petitioner cites no instances of a conflict with other Circuits on this question, and respondents know of none.

Petitioner's contention that the ruling below emasculates Louisiana's Teacher Tenure Law is simply not true. The decision below is simply an application of the standard enunciated in Thompson, supra, to the facts and circumstances of the particular case at bar. The Fifth Circuit in Thompson was concerned with ending the circumvention of Singleton by school boards, bent on discrimination, labelling dismissals as being "for cause". Further, in the instant case, the Court of Appeals was dealing with a school board which had over the past four or five years repeatedly circumvented and resisted its orders relative to racial discrimination in its employment practices, and in this context, found it

necessary to provide very specific guicelines to prevent such discrimination in the future. The discriminatory practices against black educators by the School Board had recently been so blatant as to even require the establishment of racial ratios in order to avoid discrimination, pending the development of objective criteria. Accordingly, the Court of Appeals in the instant case initially required in its June 15, 1972 order, that this school board provide objective criteria for dismissals "for cause", apparently to prevent this board from further circumventing its orders by sham cause hearings.

Accordingly, the decision of the Court of Appeals is neither in conflict with the decisions of this Court, nor in conflict with decisions of other Courts of Appeals, but rather is a narrow decision limited to the facts of this case designed to bring this recalcitrant school board in line with its decisions. Accordingly, this case does not raise issues of a magnitude which would warrant this Court's granting a writ of certiorari, but rather involves narrow issues limited to the context of this particular case.

II. The Decision Below is Not in Conflict with the Decision of this Court in Edelman v. Jordan, U.S. , 29 La.Ed.2d 662, 94 S.Ct. (March 25, 1974).

It is questionable whether the Eleventh Amendment's applicability as a bar to the

back pay award affirmed by the Court of Appeals is properly before this Court, in that the issue was only raised before the Court of Appeals in an untimely motion for rehearing, and since the case has been remanded to the District Court for determination of the exact amount of the back pay award. However, even if the issue is properly before this Court, it is quite clear that this Court's decision in Edelman, supra, clearly does not bar such an award, and it would be inappropriate for the Court to grant review on this issue. Edelman, supra, is not applicable because (1) this local school board cannot be considered the alter ego of the State for Eleventh Amendment purposes; and (2) here, there has been a determination that the "State action" in dismissing this black educator was racially discriminatory and therefore unconstitutional under the Fourteenth Amendment, and the Fourteenth Amendment particularly as it relates to racial discrimination, limits the State's Eleventh Amendment sovereign immunity.

Louisiana schoool boards, including the petitioner herein, are bodies corporate with the power to sue and be sued (L.S.A.-R.S. 17:51), to make contracts (L.S.A.-R.S. 17:81, 83), to purchase and hold property (L.S.A.-R.S. 17:81), and to sell property (L.S.A.-R.S. 17:87.6). The members of the Board are elected from districts within the parish, and the Board has the power, and in fact does, levy and collect taxes for the support of its schools. Louisiana courts have consistently held that school boards and similar autonomous

subentities are not the alter ego of the State, but are distinct for sovereing immunity purposes. See, Board of CP of New Orleans v. Splendour S&E Co., La. 1973, 273 So.2d 19, and Orleans Parish School Board v. Williams, La. 1974, 300 So.2d 848. Further, federal district courts in Louisiana have reached the same interpretation that school boards are distinct from the State for sovereign immunity and Eleventh Amendment purposes. See, Morgan Dallas Corp. v. Orleans Parish School Board (U.S.D.C, E.D.La., New Orleans Division, August 27, 1969, C.A. No. 69-1431, Rubin, J.) and Stapp v. Avoyelles Parish School Board, (U.S.D.C., W.D.La., Alexandria Division, No. 74-612, Ruling and Order of August 1, 1974, Scott, J.).

This Court in Edelman, supra, distinguished and did not overturn its prior decision in Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964), indicating at Note 12 that "a county does not occupy the same position as the state for the purposes of the Eleventh Amendment". It thus appears clear that Edelman, supra, does not bar a back pay judgment against a local school board such as petitioner herein. Only the school board, its individual members, and its superintendent are named as defendants herein, and the judgment would not operate against the State of Louisiana or its Treasury, but could be satisfied out of the School Board's tax revenues or out of the pockets of the individual members of the School Board found to be acting under color of law in a racially discriminatory and unconstitutional manner.

Although it appears clear that this case can be disposed of under the Footnote 12 exception of Edelman, respondent notes that a strong argument can be made that the Fourteenth Amendment limits the States' sovereign immunity under the Eleventh Amendment, particularly in the context of racial discrimination, which the Fourteenth Amendment was explicitly designed to end.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit on June 15, 1972 requiring the development of objective criteria for "cause" dismissals, and its decision of April 24, 1974 disallowing the School Board's tactic of dismissing Mr. Davis during the period in which it had received an extension for submitting the criteria required by the June 15, 1972 Order, were merely appropriately strong rememdies to prevent this recalcitrant School Board from further circumventing the requirements of Singleton. Accordingly, the issue is not of a magnitude which would warrant this Court's exercise of its certiorari jurisdiction. Further, the decision of the United States Court of Appeals is consistent with this Court's decision in Edelman, supra, and fits comfortably within the Footnote 12 exception of that case.

Accordingly, respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE

I, Stanley A. Halpin, Jr., Attorney for Respondent, and a member of the Bar of the United States Supreme Court, do hereby certify that on this 3rd day of December, 1974, I served copies of the foregoing Response to Petition for Writ of Certiorari on the attorneys of record for petitioners herein, Mr. John F. Ward, Jr. and Mr. W.C. Falkenheiner, by mailing three copies of same, postage prepaid, to them at their offices, 770 North Street, Baton Rouge, Louisiana 70802, and Office of the District Attorney, Vidalia, Louisiana 71373, respectively.

STANLEY A. HALPIN, JR.
Counsel for Respondent

EXHIBIT "A"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

FILED: September 3, 1970

IRMA J. SMITH, et al.,
Plaintiffs,
UNITED STATES OF AMERICA,
Plaintiff-Intervenor,
versus
CONCORDIA PARISH SCHOOL BOARD, et al.,
Defendants.

CIVIL ACTION
No.11577

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This school desegregation suit was originally filed in Novmeber, 1965. Operating under various forms of freedon-of-choice the school system remained racially segregated. In August, 1969, on remand from Hall, et al. v. St.Helena Parish School Board, et al., 417 F. 2d 801 (5th Cir.,1969), this Court approved a school board proposed desegregation plan which called for the gradual conversion to a unitary system over a three-year period. The plan also provided for the separation of students by sex in the Ferriday and Vidalia schools as they were racially integrated. The plaintiffs appealed and the Fifth Circuit Court of Appeals reversed this Court's order in part and directed the conversion to a unitary system by the beginning of the 1970-71 school year. The question of the constitutionality of sex separation was pretermitted by the Court. Singleton, et al. v. Jackson Municipal Separate School System, et al., ____F. 2d ____(No. 26285, Dec.1,1969). Plaintiffs appealed to the Supreme Court and that court reversed the decision of the Fifth Circuit

and ordered the conversion of the Concordia Parish system by February 1, 1970. Carter, et al. v. West Feliciana Parish School Board, et al., ____U.S._____,90 S.Ct._____(1970).

On remand, this Court, by order of January 30, 1970, ordered the elimination of the dual system by February 1st, but approved the School Board's plan of separating students by sex in the towns of Ferriday and Vidalia, pending a hearing to be held before the start of the 1970-71 school term. Further the January 30, 1970 order of this Court incorporated the ruling of the Fifth Circuit in this case sub nom Singleton v. Jackson Municipal Separate School System, supra, relative to desegregation of faculty and other staff.

On August 5th and 6th the Board's sex separation plan came on for a hearing along with private plaintiffs' motion for supplemental relief for faculty and staff who had been dismissed or demoted in alleged violation of the Singleton provisions. After a day and a half of testimony this Court, because of its overcrowded docket, continued the matters until October. Upon application of private plaintiffs, the Fifth Circuit Court of Appeals by order of August 18, 1970, directed this Court to give preference to this cause and conduct an evidentiary hearing so that its findings of fact and conclusions of law concerning the Board's sex separation modification and teacher dismissal would be made and filed before the beginning of the 1970-71 school term. Accordingly, upon the basis of the oral and documentary evidence offered by the parties at the hearing on August 5, 6, 24, 26 and 27, 1970, and the other materials of record in this case, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

SEX SEPARATION

(1) Sex separation of the schools was first proposed by this Board only after this Court had rejected a gerrymandered zoning plan under which all schools would have remained coeducational, but racially segregated. Although the Board claims that it had considered sex separation for several years prior to 1970, it unquestionably preferred a coeducational system as long as it could maintain racially segregated schools.

The plaintiffs' expert witness, Dr. Scott Kester, Ph.D., an educational psychologist of the University of Miami, testified that he had conducted a survey of persons in Concordia Parish and had determined that the large majority of both black and white citizens of the parish believe the plan to be racially motivated. Moreover, the uncontradicted testimony of black citizens of the parish indicate that the common opinion of the black community is that the only basis for the sex separation plan is to isolate and "protect" white girls from black boys. In light of the consistent, strong testimony of both Dr.Kester and citizens of Concordia Parish, the only possible conclusion this Court can reach is that the plan proposed by the Board insofar as it provides for the separation of the sexes in the schools, is racially motivated and once again, stamps a "badge of inferiority" on black people.

(2) The Court is also convinced from the testimony of Dr. Kester that the plan is educationally unsound. There is no meaningful evidence that boys and girls are, for educationaly purposes, so different as to make sex separation educationally beneficial, and there

is serious question among experts as to whether such separation can be educationally sound under any circumstances.

But most important, is the testimony of Dr. Kester, which this Court finds sound and convincing, that where black students perceive sex separation as racially motivated such would have a positive detrimental affect on their willingness to learn and general educational motivation. It is of course, crystal clear that black students in Concordia Parish do see the plan as racially motivated. The Court thus concludes that the separation of the sexes in the school system is educationally detrimental for black students and as a result, educationally unsound and unconstitutional for the system as a whole.

FACULTY AND STAFF DISMISSALS, HIRINGS, PROMOTIONS AND DEMOTIONS.

(3) This Court finds that approximately twenty teachers (only one of whom is white) who were employed by the Board in the 1969-70 term were dismissed. The Board tentatively hired twenty-six new teachers for the 1970-71 term, all of whom are white.

(4) The criteria developed by the Board for dismissals and demotions included such factors as "personality" and "community relations" and falls short of being objective and non-racial as required by Singleton. The Board has failed to make an evaluation under the criteria. Further the court concludes that the dismissals and demotions were racially discriminatory in their motive and effect.

(5) The following teachers are found to have been dismissed without evaluation under objective criteria and for racially discriminatory reasons:

(5) The following teachers are found to have been dismissed without evaluation under objective criteria and for racially discriminatory reasons:

1. James Aubry
2. Melvara Bell
3. Luther Bradford
4. Roland Bowser
5. James Donald
6. Andrew Irvin
7. Ethel M. Irvin
8. Renice Jackson
9. Velma McCaleb
10. Ernestine Mitchell
11. Inder Mitchell
12. Katie Moore
13. Ray Nelson
14. Virginia Robb
15. Barney Schoby
16. Jerry Smith
17. Delphine Washington
18. Harrington Watson
19. Cleveland Watts
20. Bessie Young

(6) Principalships, assistant principalships, coach positions and all other special or supervisory positions are secured by supplemental contracts on Concordia Parish. These contracts are ordinarily issued no later than June. This year, however, Superintendent Green testified that these contracts had not yet been issued. He testified that Sammy Davis, Jr. and Mack Moore, black former principals, were not to receive such contracts. These are clearly demotions under Singleton. He did not know whether the other black faculty and staff who received such contracts in the 1969-70 term would receive them in the 1970-71 term, thus leaving all black supervisory personnel in a state of limbo.

(7) Superintendent Green testified that there would be no assistant principals in any of the schools in the 1970-71 term. He testified that at least one black principal would become an "instructional supervisor" assigned to a particular school.

(8) Upon the testimony this Court concludes that where a principal is made an "instructional supervisory" assigned to a particular school, this is a demotion.

(9) The testimony of Superintendent Green indicates that at least four promotions to supervisory positions have been made for the 1970-71 term. These promotions were received by Walter Stapley, Ralph Ainsworth, Martha Paul and Charles Tisdale, all of whom are white. No black was offered or received a promotion.

(10) The Court concludes from the evidence that promotions by the Board were racially discriminatory.

(11) For the 1970-71 term, twenty-six white teachers in the words of Superintendent Green were "tentatively offered positions subject to approval of the Concordia Parish School Board and the United States Courts."

(12) Superintendent Green testified that although many black teachers applied none were offered positions.

(13) The Court concludes that the hiring of teachers for the 1970-71 term was carried out on a racially discriminatory basis.

PUBLIC AID TO SEGREGATION ACADEMIES

(14) On the basis of the Board's answers to interrogatories propounded by private plaintiffs and upon testimony scattered

throughout the hearing this Court concludes that the Concordia Parish School Board has loaned or given desks, books and other assistance to private segregationist academies, to wit Concordia Christian Academy and Huntington Academy, in circumvention of this Court's desegregation orders.

CONCLUSIONS OF LAW

(1) Sex-separation in a desegregation plan is constitutionally impermissible except upon a finding based on proof that the plan was devised and is to be promulgated for educational purposes as distinguished from racially discriminatory purposes. United States v. Amite County School District, 5th Cir., 1969___F. 2d ____ (Nos.28,030 and 28,042, slip opinion dated December 10, 1969).

(2) The burden of proof upon a school board to show that a sex separation plan was devised and is to be promulgated for educational purposes is extremely heavy in view of the fact that empirical research in the field of education and psychology has demonstrated little if any educational benefit of separating students by sex.

(3) Sex-separation as a feature of a plan of racial desegregation proposed by a school board which has historically segregated its students by race tends to promote a feeling of isolation in black students and, thus, is educationally unsound for black students and constitutionally impermissible - especially where black students perceive sex separation as being racially motivated.

In Brown, et al. v. Board of Education of Topeka, Kan., et al., 347 U.S. 493 (1954) (Brown I) the Supreme Court discussed the harms inflicted by segregation:

> In Sweatt v. Painter, supra (339 U.S. 629, 70 S. Ct. 850), in finding that a segregated law school for Negroes could not provide them equal education opportunities, this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In McLaurin v. Oklahoma State Regents, supra (339 U.S. 637 70 S. Ct. 853), the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations:'***his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.' Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.
>
> Brown I, supra, at pp. 493-494

In this case we must similarly draw in such intangible considerations in reference to the harm which will inevitably and permanently be inflicted on those black school children who are subjected to the plan of sex separation.

Indisputably, the proposed plan is the product of racial hostility. The implications[1/]

1/ Numerous authorities have discussed the white man's anxiety as regards to sex and race.

(footnote cont'd on next page)

will not be lost on black children who will continue to feel, with good reason, that they are inferior in the eyes of the School Board, such an awareness cannot but continue to generate, in the black children, "feelings of inferiority as to their status in the community (such) that may affect their hearts and minds in a way unlikely ever to be undone." Brown I, supra at p. 494.

The segregation contemplated by this proposal would deprive the black children of Concordia Parish one further opportunity to develop relationships with members of the

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1/ cont'd

"This rank order-which will be referred to as the white man's rank order of discriminations-...held heavily unanimously in the following:

Rank 1. Highest in this order stands the bar against intermarriage and sexual intercourse involving white women.

Rank 2. Next come the several etiquettes and discriminations, which specifically concern behavior in personal relations...

Rank 3. Thereafter follow the segregations and discriminations in use of public facilities such as schools, churches, and means of conveyance.

It should be noted that the rank order is very apparently determined by the factors of sex and social status, so that the closer the association of a type of interracial behavior is sexual and social intercourse on an equalitarian basis, the higher it ranks among the forbidden things"

1 Myrdal, An American Dilemma at pp.60-61

dominant class;[2] it would curtail their "exemption from legal discrimination implying (their) inferiority in civil society." Strauder v. West Virginia, 100 Wall, 303 at pp. 307-308 (1879).

The argument that white children will also be equally affected by the proposed plan is irrelevant. "Judicial inquiry under Equal Protection, therefore, does not end in a showing of equal application among the members of the class defined by the legislation. The Court must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose." McLaughlin v. State of Florida, 379 U.S. 184 at p. 191 (1964). In Loving v. Virginia, 388 U.S. 1 (1967), the Supreme Court stated that when dealing with racial classifications, "the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes according to race, "388 U.S. at 9. Certainly the same rule should apply to facially non-racial classifications which are nonetheless racially motivated.

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1 cont'd

(1st ed. 1944)
"Much of the last ditch opposition to school desegregation, and other desegregation, is based on the idea that it will eventually lead to intermarriage."
Greenberg, Race Relations and American Law at p. 343 (1959).

[2] See Fiss, Racial Imbalance in the Schools, 78 Harv.L.Rev. 564 (1965).

(4) "If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by /a/ school district which will result in a dismissal or demotion of any such staff members, the staff members to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school district." Order of January 30, 1970; Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211, 1218 (5th Cir., 1969)(en banc), reversed on other grounds, sub nom; Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970).

(5) A school system may not dismiss or denote faculty and staff members on the basis of race. Order of January 30, 1970; Singleton v. Jackson Municipal Separate School District, supra at 1218.

(6) The system proposes to assign former black principals and coaches to positions in which they will have "less pay/and/ less responsibility" than in their previous assignments. These new assignments would accordingly be "demotion/s/," as that term is used in the Court's order of January 30, 1970, and in Singleton v. Jackson Municipal Separate School District, supra at 1218.

(7) The defendants historically operated a dual school system and now propose to dismiss and demote a disproportionate number of black persons. For these reasons, and in view of their superior access to the pertinent information, the defendants have the burden of showing "by clear and convincing evidence" that their actions with respect to dismissals and demotions are free of racial discrimination and in accordance with the standards and procedures

set forth in the January 30, 1970 order of this Court. Chambers v. Hendersonville City Board of Education, 364 F. 2d 189, 192-3 (4th Cir., 1966); Rolfe v. County Board of Education of Lincoln County, Tenn., 391 F. 2d 77 (6th Cir., 1968). The Board did not satisfy this burden.

(8) "The Courts have recognized that in the field of racial discrimination statistics such as those set out in /the Findings of Fact/ tell the basic story." Williams v. Wallace, 240 F. Supp. 100, 108, n. 6(M.D.Ala., 1965); State of Alabama v. United States, 304 F.2d 583, 586 (5th Cir., 1962), affirmed, 371 U.S. 37 (1962) (voting); United States v. Board of Education of City of Bessemer, 396 F. 2d 44, 46 (5th Cir., 1968) (faculty assignment); United States v. Indianola Municipal Separate School District, 410 F. 2d 626, 631 (5th Cir., 1969), cert. denied, 396 U.S. 1011) (1970)student assignment); United States v. Sheet Metal Workers Int. Association, Local 36; 416,F.2d 123; 127, n.7 (8th Cir., 1969)(employment discrimination).

In this case, the school system proposes to dismiss and demote a disproportionate number of black faculty and staff members and to hire and promote disproportionate number of white persons, given the availablity of apparently qualified black applicants. In such circumstances, the cases cited above hold that the statistical pattern is a factor which a court may rely upon in finding actions improper; and this Court does so here.

(9) The system did not comply with the requirement that it select personnel to be demoted "on the basis of objective and reasonable non discriminatory standards from among all the staff of the school district." Order of January 30, 1970; Singleton v. Jackson Municipal Separate School District, supra at

1218.

(10) This Court's order of January 30, 1970, and the decision of Singleton v. Jackson Municipal Separate School District, supra, require that "objective" criteria be utilized in selecting persons to be demoted. It appears, on the basis of this record, that a fair method of selecting principals here is to give weight to "objective" factors such as: degrees held; experience in the Concordia Parish system as a principal; total experience as a principal; and experience in education other than as a principal. These are not the only conceivable "objective" factors. There would be a heavy burden to justify reliance on facts predating the last employment of an individual. Henry v. Clarksdale Municipal Separate School District, supra at 688, n. 10; United States v. Indianola Municipal Separate School District, supra at 628. Finally, it is clear that the kind of general "judgments," "conclusions" and "opinions" of the superiority of one employee to another, relied on by the system at the hearing on August 25, 26 and 27 are not the "objective" standards required by the governing case law. United States v. Local 36, Sheet Metal Workers, 416 F. 2d 123, 136, n. 1 (8th Cir., 1969); Dobbins v. Local 212, IBEW, supra, at 453.

(11) The Court must scrutinize possible criteria for determining future assignments to insure that those utilized do not, although facially neutral, perpetuate the effects of past discrimination. See e.g. Lane v. Wilson 307 U.S. 268 (1939) (voting); Hunt v. Arnold, 172 F. Supp. 837 (N.D.Ga., 1959)(voucher requirement for determining admission to college). The size of the school of which a person has in the past been principal might in some instances be one consideration in determining future assignment. Here, however, general application of this criterion would

tend to disadvantage black persons because they were assigned in this system, on the basis of race, to all-black schools, which, in general, were the smaller schools in the system. See Lee v. Macon County Board of Education, 267 F. Supp. 458, 470-2 (M.D. Ala., 1967), affirmed, sub nom. Wallace v. United States, 389 U,S. 215 (1967). Accordingly, reference to school size is appropriate here only where in the particular situation its use does not perpetuate past discrimination.

(12) This Court has broad discretion in fashioning a remedy to eliminate the unlawful practices shown by the evidence presented at the hearing on August 25, 26 and 27. Brown v. Board of Education, 349 U.S. 299-301 (1955); United States v. Montgomery County Board of Education, 395 U.S. 225 (1969). "/T/he court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances." Porter v. Warner Co., 328 U.S. 395, 398 (1946). In Brown II, the court recognized that framing appropriate relief in school desegregation cases might require district courts to evaluate "public and private considerations..." Brown II, supra at 300 (emphasis added).

(13) The court has found that the general provisions forbidding discrimination in employment practices in the court's order of January 30, 1970, were ineffective. Non-compliance resulted from improper application of subjective standards. In this situation, the court is authorized to enter more specific relief to insure compliance with the governing legal standards. United States v. Montgomery County Board of Education, supra. Therefore, so long as the Board persists in using subjective standards, and in the absence of a plan containing objective standards for hiring new employees and a method of applying the

standards, the district will be directed to employ new faculty and professional staff members so that the proportion of new black employees is about the same as their proportion currently in the entire system. See Moore v. Tangipahoa Parish School Board, 304 F.Supp. 244, 253 (E.D.La., 1969).

(14) The court has authority to require the system to keep records and report to the court and the parties, with respect to dismissals, demotions, promotions and the employment of new faculty and staff members. Lee v. Macon County Board of Education, supra, 267 F. Supp. at 484-5, 490; United States v. School District 151 of Cook County, Ill., 301 F.Supp. 201, 234-5, 237 (N.E.Ill., 1969).

(15) The law now requires school systems to operate in a unitary manner, pending the outcome of litigation. Singleton v. Jackson Municipal School District, supra at 1216. This procedure may be utilized in this case with respect to dismissals, demotions, promotions, and newly hired faculty and staff.

(16) "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the /14th/ amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law." Cooper v. Aaron, 358 U.S. 1 78 S.Ct. 1401, 1410 (1958). See also Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 84 S.Ct. 1226, 1233-4 (1964); Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La. 1961), aff'd. per curiam, 368 U.S. 515(1962).

(17) Without reaching the quewstion of the constitutionality of Louisiana statues allowing school boards to provide books, transportation and equipment to private and parochial schools (e.g. L.S.A. - R.S. 17:352, 17:158), the Court finds that if the result obtained under these statutes is public assistance to schools which are racially segregated, such result is unconstitutional and the board can be enjoined from so assisting these schools.

O R D E R

This cause came on for hearing on August 5th and August 24, 1970. The record before the Court contains two school desegregation plans, one submitted by the Office of Education, United States Department of Health, Education and Welfare (H. E. W.) and the other plan submitted by the Concordia Parish School Board. The plan submitted by H. E. W. calls for the zoning of the schools in the outlying areas and for the pairing of the schools in the towns of Vidalia and Ferriday. Similarly, the School Board's plan provides attendance zones for the rural schools, but in the towns of Vidalia and Ferriday assigns students on the basis of sex. The school Board plan was approved on a temporary basis for the spring term of the 1969-70 year by the January 30, 1970 order of this Court. This Court now finds that the Board's plan was devised and promulgated for racially discriminatory purposes rather than educational purposes.

Accordingly, it is therefore ordered that the Concordia Parish School Board, their officers, agents, employees, and all persons acting in concert or participation with them be and hereby are ORDERED to announce and implement, effective the start of the 1970-71

school term, the H. E. W. plan of student desegregation which is a part of the record in this case. The School Board may, if it desires, modify the H. E. W. plan in the following particulars only: that the Clayton School be grades 1-4; and that under alternate Plan II for the Ferriday area, Ferriday Junior High School be grade 8 and Senior High School be grade 7.

IT IS FURTHER ORDERED that in accordance with the decision of the United States Court of Appeals for the Fifth Circuit in Singleton v. Jackson Municipal Separate School System (and consolidated cases en banc), _____F. 2d_____ (No. 26285, December, 1969) and as earlier ordered by this Court in its January 30, 1970 order, the parties defendants are ordered to implement and adhere to the following provisions:

DESEGREGATION OF FACULTY AND OTHER STAFF

The School Board shall announce and implement the following policies:

1. Effective not later than February 1, 1970, the principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is indended for Negro students or white students. For the remainder of the 1969-70 school year the district shall assign the staff described above so that the ratio of Negro to white teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.

The school district shall, to the extent necessary to carry out this desegregation plan, direct members of its staff as a condition of continued employment to accept new assignments.

2. Staff members who work directly with children, and professional staff who work on the administrative level will be hired,assigned, promoted, paid, demoted, dismissed and otherwise treated without regard to race, color or national origin.

3. If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective

and reasonable non-discriminatory standards from among all the staff of the school district. In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national orgin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such a reduction, the school board will develop or require the development of non-racial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request of the dismissed or demoted employee.

"Demotion" as used above includes any re-assignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experience within a reasonable current period. In general and depending upon the subject matter involved, five years is such a reasonable period.

MAJORITY TO MINORITY TRANSFER POLICY

The school district shall permit a

student attending a school in which his race is in the majority to choose to attend another school, where space is available and where his race is in the minority.

TRANSPORTATION

The transportation system, in those school districts having transportation systems, shall be completely re-examined regularly by the superintendent, his staff, and the school board. Bus routes and the assignment of students to buses will be designed to insure the transportation of all eligible pupils on a non-segregated and otherwise non-discriminatory basis.

SCHOOL CONSTRUCTION AND SITE SELECTION

All school construction, school consolidation, and site selection (including the location of any temporary classrooms) in the system shall be done in a manner which will prevent the recurrence of the dual school structure once this desegregation plan is implemented.

ATTENDANCE OUTSIDE SYSTEM OF RESIDENCE

If the school district grants transfers to students living in the district for their attendance at public schools outside the district, or if it permits transfers into the district of students who live outside the district, it shall do so on a non-discriminatory basis, except that it shall not consent to transfers where the cumulative effect will reduce desegregation in either district or reinforce the dual school system.

IT IS FURTHER ORDERED that the Concordia Parish School Board and its Superintendent

file with this Court on or before July 15, 1971 and each subsequent year, a written report reflecting:

(1) Proposed non-racial objective criteria for selecting among all teachers those to be dismissed, if any, and the system's proposed application of those criteria to the teachers in the system, including persons newly employed for the term immediately following the report.

(2) Proposed non-racial objective criteria for selecting among all principals and supervisory staff in the system those to be demoted, if any, and the system's proposed application of those criteria to the principals and other supervisory staff in the system, including persons newly employed for the term immediately following the report.

(3) Proposed non-racial objective criteria for selecting among all coaches in the system those to be demoted, if any, and the system's proposed application of those criteria to the coaches in the system, including any person to be newly employed for the term immediately following the report.

(4) The following with respect to each person to be employed as principal or in any other supervisory position, and each black person who has ever held a principalship or other supervisory position in the system:

Name Address Race Age

for each degree;

-Type

-Year earned

-Major

-Institution earned

-Type of certificate

Classroom teaching experience;

-Total

-In Concordia Parish

Experience as an administrator;
(distinguish among principal, assistant principal and other administrative positions)

-Total

-In Concordia Parish

Employment in term immediately preceding report;

-System

-School

-Position

-Salary

Proposed employment in term immediately following report;

-System

-School

-Position

-Salary

Whether or not in tenure status;

The report should also show for which school(s) no person is presently employed as principal for the term immediately following the report.

(5) The following with respect to each person to be a coach or assistant coach in the system during the term immediately following the report.

Name Address Race Age

for each degree;

-Type

-Year earned

-Major

-Institution earned

-Type of certificate

Classroom teach experience;

-Total

-In Concordia Parish

Coaching experience;

-Total-by sport

-Concordia Parish-by sport

-Record of teams, by sport during last two years as coach in Concordia Parish

Employment in term immediately preceding report;

-System

-School

-Teaching position

-Coaching position

-Regular salary

-Coaching supplement

Also show for each school available coaching positions for the term immediately following the report.

(6) The name, address and race of each teacher achieving tenure status in the year of the report, and the name, address and race of each tenure or non-tenure teacher who was not re-employed for the term immediately following the report and the reason for such action.

(7) The number of new applicants by race for teaching positions in the system for the term immediately following the report, and the number of teachers by race, newly employed for the term immediately following the report.

IT IS FURTHER ORDERED that for the 1970-71 school term, the School Board shall comply with the following provisions, in the nature of a preliminary injunction:

PRELIMINARY INJUNCTION

(1) For the 1970-71 school term the

Concordia Parish School Board is ordered to reinstate all teachers dismissed by the Concordia Parish School Board including but not limited to the following:

1. James Aubry
2. Melvara Bell
3. Luther Bradford
4. Roland Bowser
5. James Donald
6. Andrew Irvin
7. Ethel M. Irvin
8. Renice Jackson
9. Velma McCaleb
10. Ernestine Mitchell
11. Inder Mitchell
12. Katie Moore
13. Ray Nelson
14. Virginia Robb
15. Barney Schoby
16. Jerry Smith
17. Delphine Washington
18. Harrington Watson
19. Cleveland Watts

20. Bessie Young

(2) Should any of these teachers fail to accept employement with the Concordia Parish School Board, because they have already obtained employment or for any other reason, the School Board shall hire black teachers in their stead.

If any of these teachers have moved their residence because of their dismissal and now desire to be re-employed by the school board, the Concordia Parish School Board shall reimburse them for their moving expenses away from and back to Concordia Parish.

(3) New teachers hired for the 1970-71 school term shall be in the proportion of 148 black (total remaining plus total dismissed) to 113 white (total remaining) or approximately 57% black and 43% white.

In other words blacks will compete only against blacks for 57% of the new positions and whites will compete against whites for 43% of the new positions.

"New Teachers" shall include not only teachers who have never been employed by the Board but also teachers who have been only employed as substitutes and former Concordia Parish teachers who were not employed by the Board in the Spring Semester of the 1969-70 term.

No black faculty or staff member shall be demoted (as defined in Singleton) from this status in the 1969-70 school term. In other words no black employee shall receive less pay, responsibility, etc., as set forth in Singleton in 1970-71 than he received in 1969-70. Reassignment from principal to

"Instructional Supervisor" is a demotion under Singleton, if the "Instructional Supervisor" is assigned to a particular school. This provision is specifically applicable to the following, but not limited to them:

1. Sammy Davis, Jr.
2. Mack Moore
3. Edward Jackson
4. William Marsalis
5. Jullian Grey
6. Barbara Rutland

Supplemental contracts shall be issued to each black faculty and staff member including the above who received such in the 1969-70 school term. All promotions from positions held in 1969-70 to positions for the 1970-71 term shall be in the approximate proportion of 57% black to 43% white but in no case shall be less than 50% black. That is, if four promotions are made at least two of these promotions shall be to black employees. The promotions given to white employees, Walter Stapley, Ralph Ainsworth, Martha Paul and Charles Tisdale shall be retracted and appointments to those positions hall be made in the manner described above.

The twenty-six white teachers who have been "tentatively offered positions subject to approval of the Concordia Parish School Board and United States Courts" shall not be hired, except as provided above for hiring of new teachers. Of the thirteen schools in Concordia Parish no less than five shall have

black principals in the 1970-71 school term.

IT IS FURTHER ORDERED, considering defendant School Board's answers to interrogatories propounded by private plaintiffs, that defendant School Board is hereby enjoined from providing desks, books or any other assistance, financial or otherwise to Concordia Christian Academy, Huntington Academy or any other segregation academy. The Board shall secure the return of any desks, books, financial or other assitance given or loaned to these academies in the past. This Court considers all school board members who vote for assistance,financial or otherwise, to these academies personally liable.

IT IS FURTHER ORDERED that:

BI-RACIAL COMMITTEE

On or before October 15, 1970,plaintiffs and defendants shall each nominate ten citizens to a bi-racial committee. The Court will then select five citizens from each set of nominations to serve on the committee. The committee will recommend to the school board and the court ways to attain and maintain a unitary school system. Members shall be appointed each year by July 1st and the chairmanship of the committee shall alternate annually between a white chairman and a black chairman. The school board shall make available the facilities of the school board offices for the committee's meetings and shall supply the committee with such information it may request.

ANNUAL REPORTS

The school board shall make a report to the court, with service upon counsel for all

parties, on October 1 of each year, of the following information:

(1) The number of students by race enrolled in the school district;

(2) The number of students by race enrolled in each school of the district;

(3) The number of students by race enrolled in each classroom in each of the schools in the district and the race of each classes' teacher;

(4) The number of full time teachers by race in the district;

(5) The number of full time teachers by race in each school in the district;

(6) The number of part time teachers by race in the district;

(7) The number of part time teachers by race in each school in the district;

(8) The requests and the results which have accrued, by race, under the majority to the minority transfer provision;

(9) The number of inter-district transfers granted since this court's order, the race of the students who were granted such transfers, and the school district to which the transfers were allowed;

(10) The number of students by race on each bus route and the race of the driver who is assigned to each route;

(11) Whether all facilities such as gymnasiums, auditoriums, and cafeterias are

being operated on a desegregated basis;

(12) A brief description of any present or proposed construction or expansion of facilities;

(13) Whether the school board has sold or abandoned any school facility, equipment, or supplies having a total value of more than $500.00 from the date of this order;

(14) A brief description of the work of the bi-racial committee since the last report;

(15) Copies of all recommendations made by the bi-racial committee.

The Court shall retain jurisdiction of this matter to insure full implementation of this decree. Monroe, La. Sept. 3-1970

s/ Ben C. Dawkins, Jr.
UNITED STATES DISTRICT JUDGE

United States District Court
Western District of Louisiana
This is to certify that the above and foregoing (illegible) is a true and correct copy of the original.

9-8-70
ALTON L. CURTIS, CLERK

By (Signature Illegible)
Deputy Clerk

EXHIBIT "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30556

IRMA J. SMITH, ET AL.,
Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellee,

versus

CONCORDIA PARISH SCHOOL BOARD, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

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(June 15, 1971)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

BY THE COURT: The Board's attack on the District Court's judgment placing the sixth grade in Vidalia Junior High School is without merit.

The District Court's findings, that the Board had neither developed nor applied objective criteria in connection with the reduction of staff positions, and that the dismissal of black teachers was racially discriminatory, are not clearly erroneous. *See Singleton, et al v. Jackson Municipal Separate School System,* 5 Cir. 1969, 419 F.2d 1211. Nor did the District Court abuse its discretion in establishing faculty racial ratios that would govern personnel changes until the school board formulated objective and reasonable non-discriminatory criteria governing dismissals, demotions, hiring and promotions. *See United States v. Montgomery County Board of Education,* 1969, 395 U.S. 225.

The Board having made no objection or suggestion to the District Court that it desired to tender evidence, we will not entertain, for the first time on appeal, an argument that the court's failure to consider evidence was error.

As of May 1, 1971, there were 5240 students in the system: 2355, or 44.94%, were white; and 2885, or 55.1%, were black. The faculty numbered 297: 141, or 47.47%, were white; and 156, or 52.53%, were black. These ratios substantially comply with *Singleton, supra.* The District Court will require the Board, the plaintiffs, and the Department of Justice to submit, within 15 days, non-discriminatory, non-racial objective criteria to cover both faculty reduction and dismissals for cause. If the parties cannot agree on such criteria, the District Court will, within thirty days thereafter, require the Board to adopt the criteria that the District Court prescribes so as to effectively comply with the provi-

sions of *Singleton, supra.* Once proper criteria have been established the merit qualifications of *Carter v. West Feliciana Parish School Board,* 5 Cir. 1970, 432 F.2d 875, will be applicable. *See Swann v. Charlotte-Mecklenburg Board of Education,* 1971, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ [No. 281, April 20, 1971].

The District Court shall require the school board to file during the school year a semi-annual report similar to those required in *United States v. Hinds County School Board,* 5 Cir. 1970, 433 F.2d 611, 618-19.

AFFIRMED AND REMANDED with Directions.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

IRMA J. SMITH, et al., Plaintiffs,	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	)	CIVIL ACTION NO. 11,577
VS.	)	
CONCORDIA PARISH SCHOOL BOARD, et al., Defendants	)	

SCHOOL BOARD'S RESPONSE TO ORDER
REQUIRING PRODUCTION OF OBJECTIVE CRITERIA

Pursuant to order of the Court of Appeals of the United States and of this Honorable Court dated the 6th day of July, 1971 that the School Board submit "non-discriminatory, non-racial objective criteria to cover both faculty reduction and dismissals for cause", the Board makes the following response:

I.

FACULTY REDUCTIONS OR DEMOTIONS
NECESSITATED BY CONVERSION TO A UNITARY SYSTEM

This School Board converted to a unitary system in February of 1970, after having been substantially integrated since September of 1969 and partially integrated since 1967. The Board does not see the possibility of any cases arising under this particular category, but if any do develop, the following objective criteria will be applied:

(a.) Seniority in the system will determine the employee to be dismissed or demoted. The employee with the greatest seniority will be given preference.

(b.) In the event seniority is equal, educational background will be used.

The School Board recognizes the defects in this recommendation since there are no provisions in it for merit considerations. However, under the limited circumstances under which this type of situation may arise, and because of the great difficulties in considering and determining merit on a purely objective basis, the Board is willing to use this purely objective criteria in this limited area.

II.

DISMISSALS FOR CAUSE

This School Board proposes to apply as its criteria in this category, the provisions of LRS 17:443, the Louisiana Tenure Act.

(a.) This statute is binding on this School Board until it is declared unconstitutional, or the School Board is ordered by higher authority to disregard it.

(b.) It limits dismissal for cause to neglect of duty, incompetence or dishonesty.

(c.) The procedural requirements satisfy due process.

While this Statute is limited to Tenured Teachers, the School Board has a present policy of using it in all cases of for cause

dismissals, even those of probationary teachers.

There will be cases when a teacher or an employee is hired on a temporary basis for an ad hoc type of situation. In such cases the employment will simply expire upon termination of the particular situation involved and there will be no need to apply this criteria.

This criteria shall be used for the dismissal for cause of permanent employees.

Vidalia, Louisiana this 30th day of August, 1971.

s/ W. C. FALKENHEINER
W. C. FALKENHEINER, Attorney for Concordia Parish School Board

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to Order Requiring Production of Objective Criteria was mailed, postage prepaid, this day to Mr. Stanley Halpin, Jr., Attorney for the Plaintiff, New Orleans, Louisiana; and the Justice Dept. of the United States, Washington, D.C.

Vidalia, Louisiana this 30th day of August, 1971.

s/ W. C. FALKENHEINER
W. C. FALKENHEINER